

The background of the cover features two thick, blue, textured cables that cross each other in the center and form a knot. The background is a smooth gradient transitioning from a warm orange on the left to a cool teal on the right. A solid black rectangular area is positioned at the top, containing the title and subtitle in white text. Another solid black rectangular area is at the bottom, containing the author's name in white text.

# **EUROPEAN UNION MIGRATION AGENCIES AT THE CROSSROADS**

SIGNIFICANT EMPOWERMENT AFTER  
THE SCHENGEN CRISIS?

VITTORIA MEISSNER

## **European Union Migration Agencies at the Crossroads: Significant Empowerment after the Schengen crisis?**

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**Vittoria Christiane Marisa Meißner, M.A.**

Vorsitzender: Prof. Dr. Stefan Wurster

Prüfende der Dissertation:

1. Prof. Dr. Eugénia da Conceição-Heldt,  
Hochschule für Politik an der TUM School of Governance
2. Prof. Dr. Sandra Lavenex,  
Département de Science Politique et Relations  
Internationales, Université de Genève

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## **Abstract**

*The dissertation explores the developments of the border control agency Frontex and the European Asylum Support Office EASO by arguing that the Schengen crisis of 2015-16 prompted EU institutions to significantly empower both agencies. However, the two migration agencies have evolved unevenly: while one agency was significantly empowered, the other still awaits major reform. Moving beyond classic principal-agent interpretations of the EU system, this research offers a new dynamic adaptation of the dyadic P-A model, applying process tracing as a method to introduce a distinction between 'primary' and 'intermediate' principals on one side, and multiple agents on the other. By doing so, this study paints a more precise picture of the complex constellation of principals and agents, as well as how these different actors determine a significant agency empowerment in the EU migration policy. In these fast-changing times, an ever-increasing Europeanisation of the border control and asylum policies seems to be the only feasible solution to achieve a common approach to migration and prevent future crises.*

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## List of Abbreviations

AFSJ	Area of Freedom Security and Justice
AIP	Asylum Intervention Pool
AMIF	Asylum, Migration and Integration Fund
AST	Asylum Support Team
CEAS	Common European Asylum System
Cepol	European Union Agency for Law Enforcement Training
CFSP	Common Foreign and Security Policy
CIRAM	Common Integrated Risk Analysis Model
CJEU	Court of Justice of the European Union
COD	Co-Decision Procedure (Ordinary Legislative Procedure)
Coreper	Committee of Permanent Representatives of the Governments of the Member States to the European Union
DG	Directorate General
EASO	European Asylum Support Office
EBCG	European Border and Coast Guard Agency
EBGT	European Border Guard Teams
EC	European Communities
ECB	European Central Bank
ECJ	European Court of Justice
ED	Executive Director
EEAS	European External Action Service
EFTA	European Free Trade Association
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EP	European Parliament
ERA	European Regulatory Agency
ESBG	European System of Border Guards
EU	European Union
EUAA	European Union Agency for Asylum
Eurodac	European Dactyloscopy
eu-LISA	European Agency for the operational management of large-scale IT systems
Europol	European Union Agency for Law Enforcement Cooperation
Eurosur	European Border Surveillance System
EURTF	European Union Regional Task Force

FRA	European Union Agency for Fundamental Rights
FRO	Fundamental Rights Officer
GAMM	Global Approach to Migration and Mobility
IBM	Integrated Border Management
ILO	Immigration Liaison Officer
IO	International Organisation
IR	International Relations
ISF	Internal Security Fund
JHA	Justice and Home Affairs
JO	Joint Operation
JRO	Joint Return Operation
KKV	King, Keohane and Verba
LIBE	Civil Liberties, Justice and Home Affairs
MB	Management Board
MEP	Member of the European Parliament
MFF	Multiannual Financial Framework
MS	Member State(s)
NGO	Non-Governmental Organisation
NMI	Non-Majoritarian Institution
P-A	Principal-Agent
QMV	Qualified Majority Voting
RABITs	Rapid Border Intervention Teams
RAU	Frontex's Risk Analysis Unit
SAR	Search and Rescue
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SEA	Single European Act
SNE	Seconded National Expert
TEC	Treaty establishing the European Community
TCN	Third-Country National
TFEU	Treaty on the Functioning of the European Union
TFM	Task Force Mediterranean
UNHCR	United Nations High Commissioner for Refugees
WB-RAN	Western Balkans Risk Analysis Network



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„Nicht ein Europa der Mauern kann sich über Grenzen hinweg versöhnen,  
sondern ein Kontinent, der seinen Grenzen das Trennende nimmt.“  
(*“Reconciliation that transcends boundaries cannot be provided by a walled Europe  
but only by a continent that removes the divisive elements from its borders.”*)

Former Federal President Richard von Weizsäcker  
during the Ceremony Commemorating the 40<sup>th</sup> Anniversary  
of the End of War in Europe and of National-Socialist Tyranny  
on 8 May 1985 at the Bundestag, Bonn

## Chapter 1: Introduction and Research Design

The migration crisis of 2015-16<sup>1</sup> put the European Union (EU) *migration* agencies Frontex<sup>2</sup> and the European Asylum Support Office (EASO)<sup>3</sup> in the limelight. Despite the criticism directed at the EU (e.g. Carrera et al. 2015) and the deteriorating co-operation among EU Member States (MS) during the crisis,<sup>4</sup> migration agencies, which are responsible for enhancing such co-operation, seem to have experienced a rebirth signalling a reinforcement of the EU executive.

The migration crisis has deeply changed the EU's political environment. While waves of migrants fleeing from their countries in search for a better future as well as waves of nationalist and populist movements distrusting common European solutions have concurrently shaken the very foundations of the EU, the EU migration policy sector is continuously expanding. In the face of the mass migration flows to Europe starting in late 2014, a transparent analysis of the role of European institutional bodies in the migration policy is of the essence to understand changes in EU migration governance as a whole.

By arguing that the migration crisis has prompted EU institutions to significantly empower EU migration agencies, the dissertation compares the developments of Frontex and EASO in the EU migration policy and the momentum they have gained after the Schengen crisis. This complements previous research, where scholars either concentrated on changes within a particular agency (Niemann and Speyer 2018) or explored the two migration agencies as mere 'proxies' of strong MS (Ripoll Servent 2018) without offering an in-depth analysis of these bodies' different development. This study offers a systematic and theory driven analysis of Frontex and EASO<sup>5</sup> and their differing evolutions. Whereas Frontex acts in the sub-policy of border control, EASO was set up within the

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<sup>1</sup> In this dissertation, I follow the existing literature and refer interchangeably to 'migration crisis' or 'Schengen crisis'. I purposely want to avoid the widespread expression of 'refugee crisis', since it appears to be partially reductive if compared to the much more precise notion of 'Schengen crisis'. The crisis this study addresses is the crisis of the Schengen system, the focus being on the systemic weaknesses of the EU common migration policy and not on the tribulations and traumatic experiences that refugees coming to the EU have to endure. Although the 'refugee crisis', a concept that has been primarily shaped by media, has gained public acknowledgement, I hereby want to stress the greater appropriateness of writing about the 'Schengen' or 'migration' crisis when it comes to the topic addressed in this study.

<sup>2</sup> Since October 2016, the former "European Agency for the Management of Operational Cooperation at the External Borders of the Member States Frontex" has changed its name in "European Border and Coast Guard Agency" (EBCG or Frontex). The dissertation also refers to Frontex as 'border agency'.

<sup>3</sup> The dissertation refers to EASO also as 'the Support Office'.

<sup>4</sup> For instance, in February 2016, the President of the European Commission, Jean-Claude Juncker, addressed the members of the European Parliament (MEPs) saying that Europeans did not have any grounds "to be proud of our performance" in the way the migratory crisis was being handled and that this was becoming "a crisis of solidarity insofar as more coordination and more Union" were needed (Agence Europe 2016a).

<sup>5</sup> In this dissertation, I narrowed the analysis down to only these two EU migration and home affairs agencies. There are currently six agencies in total working under the European Commission's Directorate General for Migration and Home Affairs: eu-LISA, the EBCG, EASO, Europol, Cefpol and the EMCDDA (Directorate General Migration and Home Affairs 2018). Whereas Frontex and EASO strictly act in the area of migration policy, the other four agencies carry out tasks primarily within the EU internal security policy – which presents points of contact with border control and asylum matters, but should be considered separate from the migration policy area.

sub-policy of asylum. Both sub-policies fall under the overarching Area of Freedom, Security and Justice (AFSJ), which is the EU regulatory framework of policies on border checks, asylum and immigration and has been one of the EU's fastest expanding policy-making domains in the last two decades (see also Monar 2010).

In the shadow of the Schengen crisis, in October 2016 Frontex was transformed into a European Border and Coast Guard Agency (EBCG),<sup>6</sup> a stronger, more independent version of the previous structure, which “will continue to be commonly referred to as ‘Frontex’” (Frontex’s Regulation of 2016, recital 11). After its resources (both financial and personnel) and tasks had been continuously expanded over time, Frontex has thus experienced – and according to a contemporary proposal by the European Commission (COM(2018) 631 final) will be probably further experiencing (see also Nielsen 2018) – an unprecedented upgrade of its mandate.

In order to expand not only the role of the border control agency, but also that of its counterpart in the adjacent asylum policy sector, i.e. EASO, in May 2016 the Commission issued a proposal for a new fully-fledged European Union Agency for Asylum (EUAA),<sup>7</sup> which was followed by a second amended proposal in September 2018. Once the proposal for a EUAA was on the table, MS started negotiating whether to reinforce the asylum office as well (see also Scipioni 2017a).

In this dissertation, I argue that these supranational transformations can be interpreted as a *significant*<sup>8</sup> *empowerment* of migration agencies building on the ‘empowerment’ definition given by Heldt and Schmidtke (2017, 2) (on which I elaborate in greater detail in Chapter 2). ‘Empowerment’ is accordingly understood as the organisational processes<sup>9</sup> that shape the tasks, scope, and capabilities of an agent *over time*. This study introduces the notion of ‘significant agency empowerment’, a *one-time event* entailing not only an increase in the agency’s functions and resources or the mere adoption of amendments to its establishing mandate, but also officially replacing the old existing structure with an entirely new one through the adoption of a new regulation.

Whether such a significant empowerment was triggered (or not) by the Schengen crisis of 2015-

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<sup>6</sup> See Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016], OJ L251/1 (hereinafter referred to as ‘Frontex’s regulation of 2016’ or ‘regulation establishing the EBCG’).

<sup>7</sup> See Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271 final.

<sup>8</sup> See also Frontex European Border and Coast Guard Agency (2017, 8).

<sup>9</sup> In Heldt and Schmidtke’s (2017) understanding, these processes do not only take the form of formal institutional change, but they also come in more subtle, incremental modes, which nevertheless have the potential to substantively shape the international organisations’ power over time.

16 in the case of both migration agencies and which specific institutional actors and scope conditions matter for such an outcome to occur is the driving question of this dissertation. More specifically, I address the following overarching research question:

Has the Schengen crisis triggered a significant empowerment of migration agencies and how exactly does significant agency empowerment play out in the sub-policies of border control and asylum?

In order to address these questions, this study builds on the principal-agent (P-A) model. The P-A model represents a “coherent theoretical toolbox of European integration theory” (see Foreword in Delreux and Adriaensen 2017b, vi), whose concepts are here revisited to theoretically frame the relations between national and supranational actors in the complex EU web. Thereby, the model is extended to the sub-level of EU agencies, thus including them in the classic P-A analysis of the EU. Furthermore, the dissertation explores the heretofore black-boxed delegation chains within the EU supranational system itself, in order to trace the evolution of each agency and the relevance of other EU institutions in actively participating in such a change. Following the P-A theoretical insights, the dissertation contends that exploring the different delegation chains between one actor (principal) and another actor (agent) in the EU “is made more complex by the presence of multiple (collective) principals” *as well as* multiple agents. Accordingly, the delegation process leading to the establishment of EU agencies cannot be reduced to “a simple transfer of power from a principal to an agent”, since there is more than one principal involved in the process, each with its own (sometimes contrasting) specific interests (Ripoll Servent 2018, 84).

Moving beyond classic P-A interpretations of the EU system, this research contributes to the existing literature by loosening the stiff, dyadic P-A model and offering a new dynamic interpretation of it. By departing from assumptions of the P-A theoretical approach, the dissertation outlines overlapping and complex P-A relations between multiple principals and multiple agents at the EU level. The P-A ‘heuristic device’ is used while applying process tracing as a method to introduce a subtler distinction between *primary* and *intermediate* principals on one side and *multiple agents* on the other. To make this distinction concrete, the dissertation provides a new definition of ‘principals’ for the specific case of the EU. For this study, a *principal* is any actor participating in the process of delegating authority to an agent and exercising control over the latter. *Primary* principals are those principals that held the powers bestowed subsequently on the agent and that coincide with the national level. *Intermediate* principals are second level actors and thus supranational principals that are simultaneously agents to the primary principals as well as

principals to other (lower level) supranational agents.

By drawing these distinctions (which are elaborated on in detail in Chapter 2), this study paints a more precise picture of the complex constellation of principals and agents as well as their inevitable overlaps in the specific case of EU migration governance.<sup>10</sup> MS are no longer identified as the only principals in the political game, but are defined as *primary principals* acting beside supranational *intermediate principals* as the Council of the European Union (henceforth the Council) and the European Parliament (EP). At the same time, the European Commission acts both as a supranational *agent* of the EU legislators and as an entity which controls and is being flanked by regulatory agencies. Therefore, the dissertation adds to the analyses of prominent P-A scholars by not assuming that a clear distinction exists between the roles of principals and agents in the EU, but by additionally demonstrating overlaps between the two, since a simple dichotomous P-A model appears to be insufficient to explain changes in power relations within EU governance. Analysing the development of the migration agencies Frontex and EASO is not only important for understanding a changed EU institutional landscape, but also sheds light on the role of the European Commission as the EU Executive and its apparent growing function within a common migration policy.

Having more than a single principal entangled in the intrinsic delegation chains of the EU system poses an important challenge for the analysis of the EU institutional development, as is evidenced by the two case studies conducted in this dissertation. Every EU agency acts under the aegis of the European Commission and, more specifically, under the Directorates General (DGs) in which the Commission is divided. Given the multi-layered structure of the EU, each agency is furthermore simultaneously responsible to the EP, the Council, and consequently, as a reflection of the latter, to all EU MS.

In the light of these considerations, I argue that given a crisis and specific scope conditions, diverging positions among the MS and specific co-decisional procedures at the supranational level are likely to determine significant agency empowerment through the intervention of the EU Executive. This outcome is more likely to occur if the policy area of interest is ‘shared’ between the national and the supranational level, and if MS have consequently become increasingly dependent

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<sup>10</sup> The EU has ever since the 1990s been described as a ‘multi-level governance’ system and consequently included in the research on new modes of governance. *Governance* distinguishes itself from the notion of *government* and denotes the “participation of public and private actors, as well as non-hierarchical forms of decision making”. It is “both a process and a state whereby public and private actors engage in the intentional regulation of societal relationships and conflicts” (Kohler-Koch and Rittberger 2006, 28). Scholars have also explored the concept of “agency governance”, looking at how the work of agencies is likely to impact various dimensions of governance (Rittberger and Wonka 2013). For more details on the conceptualisation of *good governance* in the EU see also the White Paper of the European Commission issued in 2001 (COM(2001) 428 final).

on the activity and know-how of the supranational agent in question. According to P-A scholars, the greater the need of states for specialisation and supranational assistance, the more likely they are going to delegate functions to their agents (Hawkins et al. 2006, 14). There are two specific interpretations of this causality. First, a crisis can produce a stronger need for information, to which principals react by granting the agent more autonomy and powers (e.g. Martin 2006). Second, P-A scholars, such as Pollack (2006, 189), who explored delegation within the EU have argued that principals are also likely to delegate more (executive) powers to their agents because of the additional need for credibility as well as for “speedy”, efficient decision-making. P-A theorists thus assume that principals follow a ‘simple’ rational-choice logic when delegating powers to their agent in the face of a crisis. P-A studies have further maintained that the context of a crisis usually induces principals to delegate more power to expert-driven agents, since “[s]pecialization allows others to provide services that states are unable or unwilling to provide unilaterally.” (Hawkins et al. 2006, 14).

The scope conditions for the causal mechanism to occur correspond to the specifics of the policy area within which decisions need to be taken. These specifics are thus the contextual conditions (e.g. temporal, spatial or institutional) to which the causal mechanism is sensitive (Beach 2017, 9ff.).

In this study I argue that the migration crisis of 2015-16 is the major trigger for actual institutional change to eventually occur and that both national and supranational actors played a prominent part to reach the outcome. In order to trace Frontex’s and EASO’s development, I examine their expanded mandate in terms of tasks, financial as well as personnel resources, and issue scope. These are changes that Heldt and Schmidtke (2017) conceptualise as *empowerment*. By distinguishing empowerment in Heldt and Schmidtke’s understanding from a *significant* agency empowerment, I seek to stress the unparalleled reform Frontex and EASO seem to have undergone since the Schengen crisis. The old structures have been replaced (or are planned to be replaced) by new ones through the adoption of a novel regulation introducing extensive changes. The dissertation thus adapts the concept of ‘empowerment’ developed in International Relations (IR) studies to the specific EU migration policy context and offers a new interpretation of it with regard to EU agencies.<sup>11</sup>

By offering a general assessment of the 2015-16 “refugee” crisis (e.g. Niemann and Zaun 2018) or comparing the Schengen crisis with the Euro crisis, both political science scholars (e.g. Biermann

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<sup>11</sup> The dissertation is embedded in the broader research project on ‘Delegation of Power to International Organizations and Institutional Empowerment over Time’ (DELPOWIO), funded by the European Research Council under the European Union’s Seventh Framework Programme for Research and Technological Development, Grant Agreement No. 312368 – for further information visit the project’s website available online under <http://delpowio.eu/> (last accessed on 10.8.2019).



et al. 2017; Börzel and Risse 2018; Genschel and Jachtenfuchs 2018; Schimmelfennig 2018) and the media (e.g. BBC News 2016; Christides and Kuntz 2017) have stressed the EU's deficiencies in the face of the Schengen crisis, emphasising the lack of solidarity between EU countries, their diverging interests, and the EU's poor capacity building. Nonetheless, against this background, little research has been conducted so far on the specific interactions between MS and EU institutions and their relative power (see also Bonjour, Ripoll Servent, and Thielemann 2017; Delreux and Adriaensen 2017b) as well as on how the policy sectors of border control and asylum are developing within the broader EU migration policy together with the institutional bodies involved (a detailed analysis of the state of the art is presented in the next section 1.1).

The foundation of the EU's present-day border control and asylum policies were laid with the conclusion of the Schengen Agreement of 1985, which led to the abolishment of the EU's internal borders. After the Amsterdam Treaty's entry into force in 1999, the EU took the first steps to develop the AFSJ and to address the ever growing importance of the *migration-security* nexus (Faist 2005). The subsequent establishment of Frontex and EASO was thus the result of this unavoidable external projection of internal security policies. As internal borders were abolished, Frontex and EASO were charged with respectively co-ordinating EU border control and asylum policies that MS had previously developed individually and sometimes at odds with each other. Accordingly, the border agency has been in charge of fostering co-operation among EU MS in the field of external border management since 2004,<sup>12</sup> whereas EASO has supported the implementation of a Common European Asylum System (CEAS) by applying a 'bottom-up' approach since 2010<sup>13</sup> to ensure that individual asylum cases are dealt with in a coherent way by all MS (EASO 2017).

In the post-Cold war security environment, new security threats emerged and the EU MS quickly realised that the past division between internal and external security had dissolved (e.g. Wolff, Wichmann, and Mounier 2009). These new 'soft' security threats refer primarily to organised crime, terrorism and illegal immigration, which are all clearly linked to the management of the EU external borders and asylum related issues. Therefore, the security rationale of the AFSJ is 'internal' with a nevertheless necessary and inevitable external side, since the EU has to protect the Schengen area from increasing threats to its common external borders and guarantee an orderly

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<sup>12</sup> See Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004], OJ L349/1 (hereinafter referred to as 'Frontex's regulation of 2004' or 'Frontex's establishing regulation').

<sup>13</sup> EASO was established through Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010], OJ L132/11 (hereinafter referred to as 'EASO's regulation').

management of migration flows.

EU regulatory agencies usually interact more with the Commission than with any other institution and vice versa. Despite this close relation, the “intergovernmental image” (Egeberg and Trondal 2017, 2) seems to prevail, leading scholars to regard EU migration agencies as *proxies* of strong EU MS and their national willpower (e.g. Ripoll Servent 2018). Conversely, other authors have interpreted the tight relationship between the European Commission and its numerous agencies as a “centralization of EU executive power” (Egeberg, Trondal, and Vestlund 2015, 610). For instance, EU agencies are monitored in their daily work by the Commission alone and have consequently become “integral components in the policy-making and implementation activities of several Commission departments” as the Directorate General for Migration and Home Affairs (DG HOME) (Egeberg, Trondal, and Vestlund 2015, 610). Against this background, the following analysis explores how far among all EU institutions the European Commission has affected the development of agencies in the area of migration and whether supranational principals concur with, or prevail over, national ones in shaping the agencies’ mandates.

In both Frontex’s and EASO’s case the premises to infer an alleged significant agency empowerment are apparently the same given that both agencies work under the broader EU migration policy and have been acknowledged to be key actors during the Schengen crisis. Nevertheless, they seem to have undergone different changes. This dissertation seeks to explain these different outcomes by treating each case as a single case study to which the same theoretical framework is applied. For each case, I traced the same theorised causal mechanism following the process-tracing method to draw a comparison between the two. According to Bayesian logic, the “prior confidence in a theory” plus the “evidential weight of new evidence” determines how much the new evidence enables the researcher to update the existing theory (Beach 2017, 10). The point of this research is hence to collect new evidence to increase confidence in and update the theoretical assumptions advanced by P-A scholars so far.

Though scholarship has advanced and revived traditional neofunctionalist and liberal intergovernmentalist explanations (e.g. Genschel and Jachtenfuchs 2018; Schimmelfennig 2018), questions about the differing development of Frontex and EASO after the crisis of 2015-16 and the mechanisms behind it remain unaddressed. Neofunctionalist academics have, for instance, argued that due to spillover effects, the 2016 reform of Frontex is the result of an imbalance between a supranational Schengen system and a weakly integrated border regime (Niemann and Speyer 2018). Although neofunctionalism has proven to be a powerful theoretical approach in EU studies, the assumption that the supranational character of the Schengen system and the emergence of a crisis

are the only two conditions for integration to occur in the related areas of border control *and* asylum lacks accuracy. If the neofunctionalist dynamics were to work in each area related to the Schengen system, besides the launch of a new EBCG a reform of the whole Dublin system<sup>14</sup> (more details on the Dublin system and follow-up regulations are outlined in Chapter 5) together with a consequent expansion of EASO's mandate should have occurred too.<sup>15</sup> Instead, such reforms seem to be at an impasse. Hence, the question arises about the dynamics behind such differentiated patterns in these two related sub-policies and about the development of the EU agencies involved.

The other framework that has dominated studies on EU migration policies and politics from the 1990s onwards is liberal intergovernmentalism (see for instance Moravcsik 1998; Bonjour, Ripoll Servent, and Thielemann 2017). Scholars of liberal intergovernmentalism maintain that MS use the EU arena according to their momentary 'restrictive policy preferences' as a venue to circumvent domestic constraints (e.g. Guiraudon 2000). Although this approach proved useful in explaining the early stages of a fast *communitarising* migration policy, its ability to elucidate the current shift of power from national governments to EU institutions in the migration policy realm, exemplified by a strengthened European Commission and the reinforcement of EU agencies, is limited.

This dissertation places itself between the two mentioned lines of thought that prevail in the literature exploring the EU migration crisis, namely a neofunctionalist and an intergovernmentalist one, in order to tackle the outstanding research questions.

Scholars have already systematically assessed the crisis of EU migration governance and in some cases defined it as an historical critical juncture (Niemann and Zaun 2018). Instead of looking at the agencies' development as a path dependent process in the historical institutionalist sense, my analysis stretches from the years when the agency Frontex and the Support Office were established, in 2004 and 2010 respectively, until mid-2018, in order to show the differences before and after the Schengen crisis. The numerous institutional entities and the activities they undertake allegedly leading to a significant empowerment of the agencies' mandates gain centre stage in this study.

The aforementioned AFSJ is the area under which asylum and immigration issues fall and within which EU competence is shared.<sup>16</sup> The EU migration agencies' growing role ever since their

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<sup>14</sup> The Dublin system was designed to assign responsibility for processing an asylum application to a single MS (for an overview see European Parliament 2017a).

<sup>15</sup> More details on the neofunctionalist approach as an alternative explanation to the significant empowerment of migration agencies are presented in the conclusion of this study (section 6.2).

<sup>16</sup> 'Shared competence' means that both the EU and its member states may adopt legally binding acts in the area concerned. However, the member states can do so only where the EU has not exercised its competence or has explicitly ceased to do so. For details see Declarations annexed to the final act of the intergovernmental conference, which adopted the Treaty of Lisbon, signed on 13 December 2007A specifically Declarations concerning provisions of the Treaties - 18. Declaration in relation to the delimitation of competences - Treaty on the Functioning of the European Union (TFEU) available online under [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_5&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_5&format=PDF) (last accessed on 07.08.2018).

establishment seems to be a symptom of deepened integration and takes place despite the very idea of the EU and its institutions being progressively challenged due to reoccurring crises.

The EU has always been a dynamic system, an “ongoing experiment in the collective governance of a multinational continent” (Wallace, Pollack, and Young 2014, 4). Scholars have attempted to explain this hybrid “agent of change” (ibid.) through numerous theories, primarily integration theories, which were inspired by IR studies, such as neofunctionalism, intergovernmentalism, and supranationalism. Although these theories have been helpful in describing specific snapshots *in* time and in explaining continuous integration, the introduction of new actors and their development *over* time seem to fall behind.

Frontex and EASO act within policy sectors that deal with issues, which highly affect state sovereignty and thus their “core state powers”, as for instance, internal security (Genschel and Jachtenfuchs 2015). As emphasised in the literature, the high sensitivity of migration issues determined the substantial lack of EU integration and the related tendency of MS to preserve their national powers in these areas (e.g. Genschel and Jachtenfuchs 2018; Zaun 2018). Since migration issues are still a prerogative of the nation states, initially highly reluctant to transfer the related competences to the EU, the sharing of powers between the national and supranational level in these issue areas is quite surprising (cf. Ripoll Servent and Trauner 2014; Trauner and Ripoll Servent 2016). The competences of the EU in this domain have increased over time through the emergence of the AFSJ, later burgeoning into a key supranational policy, and the creation of new institutional bodies (e.g. Kaunert, Occhipinti, and Léonard 2014).

Whereas Frontex’s extensive reform took place after the 2015-16 migration crisis through the introduction of a “significantly expanded mandate and resources” (Leggeri 2017), little has changed in the case of EASO, which is still a “fledgling agency” (Comte 2010, 374). Despite the fact that the Commission’s proposal for reforming the Support Office was supported by the EP (European Parliament 2016a, 22), in mid-2018 the EUAA proposal was still being discussed. The European Commission made another attempt in September 2018, when it presented its amended regulation proposal for a new EUAA (COM(2018) 633 final), whose adoption is nevertheless still pending as well.

The different speeds at which the two migration agencies have developed suggest differences in prerogatives and issue salience. EU institutions and MS seem to have prioritised the enforcement of external border control over further changes in the asylum policy realm. According to the Treaty of Lisbon, however, as well as EU documents on the development of the AFSJ in particular, border control and asylum should advance conjointly as two sub-policies falling under the same common migration policy and are hence inextricably related to one another. Exemplary in this regard is for

instance the 2018 (second) amended proposal for a new EUAA (COM(2018) 633 final), which stresses the importance of reforming EASO, in order to ensure strengthened co-operation between the future agency for asylum and the EBCG, in particular at the so-called ‘hotspots’ (more details on this notion follow in Chapter 4 and 5). The question then arises how one agency becomes significantly empowered and the other yet awaits such a change.

Heretofore, requests for a comprehensive approach to both border control and asylum issues have not been met. Whereas external border control has been boosted ever since the Schengen crisis of 2015-16, the structural weaknesses of the CEAS, the broader legislative framework under which the Support Office acts, have not been successfully addressed so far, despite EASO’s growing role in the sector.

The facts that are presented throughout this study suggest an actual swift significant empowerment of Frontex and only an expected one with no follow-up decision of EASO, notwithstanding that policies on border control and asylum should advance together (e.g. COM(2015)240 final; Monar 2016). After reviewing the current state of the art, I outline in detail the research question and the contribution this study makes as well as the applied methodology.

## **1.1 State of the Art**

Scholars have widely investigated the delegation of power and discretion to international organisations (IOs) in general (e.g. Hawkins et al. 2006; Nielson and Tierney 2003; Heldt and Schmidtke 2017) and to the European Commission, the EP, and the European Court of Justice (ECJ) in particular (e.g. Dür and Elsig 2011; Franchino 2007; Pollack 2003; 2006). Even so, little research has been conducted into the specific constellation of principals and delegation chains that include EU migration agencies.

The goal of this research is to trace complex delegation chains ultimately leading to a significant agency empowerment. In order to do so, the dissertation builds on two main strands of the literature. It draws first on academic works investigating the politics of delegation (e.g. Dehousse 2016; Hawkins et al. 2006; Pollack 2003) and those examining the creation and activity of EU agencies (e.g. Busuioc et al., 2012; Gerardin et al., 2005; Rittberger and Wonka, 2013). The second selection of articles and studies deals with the evolution of a common migration policy at the EU level. Specifically, studies were reviewed exploring the development of the AFSJ (e.g. Carrera and Guild 2014; Kaunert et al. 2014; Trauner and Ripoll Servent 2016) as well as the Schengen crisis (Biermann et al. 2017; Börzel and Risse 2018; Lavenex 2018; Scipioni 2017b; Schimmelfennig 2018). Besides the academic literature, the dissertation analyses official documents issued by EU institutions, e.g. annual reports, work programmes, and analyses published by the

agencies in question; press releases, communications and proposals of the European Commission; EU regulations adopted by the Council and – after the introduction of the co-decision procedure (COD) as the official legislative procedure of the EU – the European Parliament; as well as official conclusions of the European Council. The content of these official documents are then integrated with the information collected through semi-structured interviews with six high-level experts working for or in the immediate vicinity of the agencies' activity realm.

### **1.1.1 Delegation and Agency Literature**

Starting with the US literature exploring the relation between the United States Congress and American regulatory agencies (Epstein and O'Halloran 1999; Pollack 2002) up to the general studies on delegation in the EU (Curtin 2005; Dehousse 2008; Franchino 2002; Pollack 2000; Thatcher and Sweet 2002), much research has been dedicated to the analysis of delegation processes to non-majoritarian institutions (NMI). The focus of studies exploring the phenomenon of NMI has often been on the legitimacy and accountability of these bodies. Despite the wide academic interest from different disciplines such as law (Hailbronner and Thym 2016; Peers and Rogers 2006) and political science (Geddes 2008; Stetter 2000), the importance of NMI in shaping EU migration policies has been mostly overlooked. Most of the contemporary studies concentrate on the role of MS or of the main EU bodies, that is the Council, the Commission, the EP and the ECJ (Arcarazo and Geddes 2013; Geddes 2008; Givens and Luedtke 2004; Guiraudon 2000).

Up until now, numerous delegation studies deploying a P-A approach have focused on the delegation processes from MS to IOs (e.g. Barnett and Finnemore 2004; da Conceição 2010). Evidence has shown that IOs are very likely to develop their own interests and gain autonomy over time (e.g. Hawkins and Jacoby 2006),<sup>17</sup> much more than one would expect when examining EU agencies given their more restricted mandates and their usually merely implementing character. There has been however a flourishing literature on the delegation of powers towards supranational EU institutions and EU non-majoritarian agencies (e.g. Bellamy and Castiglione 2011; Curtin 2005; Dehousse 2008; Egeberg, Trondal, and Vestlund 2015; Franchino 2007; Pollack 2006; Scipioni 2017a; Thatcher and Stone Sweet 2002).

In studies on EU agencies, emphasis is given to the recurring neologism '*agencification*', which refers to the proliferation of agencies at the European level since the 1970s. The concept of

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<sup>17</sup> Scholars have also gone one step further by conceptualising the 'power' of IOs, which indicates the growing influence of these institutions since the notion of power has usually been deployed in political science with reference to states only (e.g. Abbott and Snidal 1998; Bachrach and Baratz 1962; Barnett and Duvall 2005). Many works have thus increasingly focused on the institutional design of IOs (e.g. Abbott and Snidal 2000; Koremenos, Lipson, and Snidal 2001) or on the vital role that IOs play nowadays in international politics (e.g. Barnett and Finnemore 1999; Heldt and Schmidtke 2017).

agencification entails a correspondence between the emergence of agencies and a growing distributed governance within the EU through the taking on of tasks from the European Commission or the EU MS by these institutional bodies (Gerardin, Muñoz, and Petit 2005; Rittberger and Wonka 2013). Although considerable research has been devoted to the emergence and consequences of agency establishment, the literary gap on the subsequent EU decision-making steps leading to more agency delegation has not been closed yet.

Within the delegation literature, many scholars focused their attention solely on EU agencies and widely discussed the reasons that lead to agency creation (e.g. Bellamy and Castiglione 2011). Three main explanations of this phenomenon have been identified. First, a functionalist one that aligns itself with classic P-A assumptions, which considers agencies as the result of a functional necessity, mainly lying in the reduction of political transaction costs (e.g. Dehousse 1997). Second, an institutional explanation according to which EU agencies evolve from existing committees or structures (e.g. Kelemen 2002). Third, an historical-rational elaboration identifying contingent events (or crises) as the root causes of institutional change (e.g. Curtin 2005; Pierson 2004). The consequences of agency creation have also received widespread attention. For instance, Busuioc et al. (2012) zoom in on the implementation of EU legislation through EU agencies and highlight its critical implications.

Egeberg and Trondal (2017) have suggested a future research agenda on EU agencies. In so doing, they offer a substantial overview of the agency literature, ranging from studies presenting an intergovernmentalist image of EU agencies (e.g. Kelemen 2002) to those academic works describing agencies as having a transnational (e.g. Dehousse 2008) or supranational character (e.g. Majone 2005). Intergovernmentalists usually see agencies as evolving from pre-existing transnational networks of national agencies (Levi-Faur 2011; Thatcher 2011). Their line of thought expects MS to avoid delegating their core functions policy areas such as defence, police and border control to agencies, although in the EU, the opposite has occurred. The transnational approach assumes that agencies are loosely connected to both the national and the EU level, allowing them to enjoy greater autonomy (Egeberg and Trondal 2017, 2–3). According to Egeberg and Trondal's review, an increasing number of studies further suggests an ongoing supranationalisation of executive power in the EU "in the form of EU agencies that may actually complement the decision-making capacity of the Commission" (ibid., 9), which is why more attention should be given to the decision-making process involving agencies.

After pointing out that the decentralised, regulatory agencies have experienced task expansion over time (which is part of the phenomenon that this research is centred on, namely *significant*

*agency empowerment*), Egeberg and Trondal conclude that agencies contribute to a “supranationalization and centralization of executive power in the EU” depending on their resources and how they are situated in the political-administrative space (*ibid.*, 2ff. and 10).

What clearly emerges from the current state of the art, is that closer research on EU migration agencies and their development is particularly relevant not only because of contemporary (historical) developments (e.g. the migration crisis of 2015-16), but also because of the lack of an in-depth and systematic analysis of the EU agencies’ growing role in the area of migration policy.

Academics have heretofore examined the continuous expansion of EU policy competences across issue-areas (closely related to the wider phenomenon of delegated governance), mainly through the lenses of neofunctionalism or rational-choice institutionalism (Börzel 2005; Pollack 2000). In particular, the existing literature on delegation has largely engaged in describing the process of delegated power in the EU, deploying the mentioned rational-choice institutionalism – within which the P-A approach is embedded (e.g. Pollack 2003; Ripoll Servent 2013; Tallberg 2002) – or organisational theory (Busuioac, Curtin, and Groenleer 2011). Other scholars widely deployed integration theories, specifically supranationalism (as the direct successor of neofunctionalism) and intergovernmentalism (Bergman 2000; Givens and Luedtke 2004; Lavenex and Uçarer 2004; Leuffen, Rittberger, and Schimmelfennig 2013).

Along with this academic research, the process of European integration has been extensively explored as well, usually focusing on the delegation of power from the EU MS to the Commission and thus drawing specific attention to the EU Executive as a *supranational* agent (Franchino 2002; da Conceição-Heldt 2011; 2017; da Conceição 2010; Dür and Elsig 2011; Gerardin, Muñoz, and Petit 2005; Kelemen 2002; Pollack 2003). The Commission has often been defined as a “supranational regulatory agency”, which has been delegated extensive executive powers by the MS through the Council (Bellamy and Castiglione 2011, 112). In this regard, Pollack (2003; 2006) has widely addressed the issue of the EU Executive being a *delegatee*, i.e. an agent, of the EU member governments. The fact that EU agencies are so closely tied to the European Commission and that scholars have invested a lot of their work in exploring the growing powers of the latter, makes one wonder why so little attention has been dedicated so far on the EU executive apparatus as a whole.

Other recurrent topics in the agency literature are the importance of the agent’s *specialisation* and ability to make credible commitments. The expertise provided by the agent represents one of the principal’s central gains when delegating authority (e.g. Hawkins et al. 2006). Haas’ remark that “control over knowledge and information is an important dimension of *power*” (Haas 1992, 2



[emphasis added]) echoes the ancient Latin aphorism attributed to Francis Bacon stating that ‘knowledge is power’. Indeed, especially in times of uncertainty and insecurity, the nation state resorts to technocratic expertise, in order to guarantee politically free policy-making (see for instance Collett 2015). Whereas rational-choice delegation theories rotate around the assumption that principals delegate to maximise performance (e.g. Hawkins et al. 2006), other authors argued that members of organisations (as the members of the Commission’s DG dealing with immigration and asylum issues)<sup>18</sup> are concerned “with reducing uncertainty and stabilizing social relations” (Boswell 2008, 473). The highly contested AFSJ in general as well as the border control and asylum policies in particular are characterised by such uncertainty. It is therefore plausible to argue that both the Commission and the Council (and by extension the MS) turn to experts and independent supranational bodies as agencies when uncertainty is particularly high. Accordingly, I argue that with uncertainty increasing during periods of crisis as in the specific case of the Schengen crisis of 2015-16, principals need more specialised knowledge and supranational assistance.

Wood (2017, 2ff.), who presents similar arguments as Boswell (2008), stressed the importance of information and defined for the first time agencies as “political entrepreneurs”. The author encompassed all 33 existing EU decentralised agencies and identified their *entrepreneurial* strategies, entrepreneurial strategy meaning how agencies share information and ideas with other actors. Wood developed his analysis by adapting studies coming from the IO literature, suggesting that studies which bridge the IO and agency literatures are not uncommon. Although my research does not dwell on the concept of agencies as *political entrepreneurs*, this notion interestingly suggests that agencies, as mentioned before, are no longer merely implementing actors, but have become more political and influential over time.

In line with this research and complementary to the mentioned studies, I pose the question of whether and how the Schengen crisis triggered a significant empowerment of these bodies through the active engagement of EU multiple agents. Researchers have usually analysed the legal delegation mandate of agencies and their creation in general (e.g. Christensen and Lægreid 2009; Dehousse 2008; Kelemen 2002; Yataganas 2001), paying limited attention to the role of specific EU agencies in the increasingly complex EU (executive) environment (e.g. Curtin and Egeberg 2008). Within this constellation of general studies, it is necessary to distinguish another large strand of literature dedicated to the enduring questions of agencies’ legitimacy, accountability and the related ‘democratic deficit’ dilemma (e.g. Busuioc 2012; Egeberg and Trondal 2017; Lord 2011;

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<sup>18</sup> The Commission has been defined as a “multi-organization” because of the multiple Directorates with their own specific interests it is composed of (Boswell 2008; Cram 1997).

Scholten and van Rijsbergen 2014; Wolff and Schout 2013; Rittberger and Wonka 2013). There are also several legal studies which deal with the legitimacy problem of EU agencies and thus with the legal ‘limits’ of agencification in the EU, since these bodies are not explicitly regulated in the EU treaties (e.g. Chiti 2009; Scholten and van Rijsbergen 2014). Some authors argue that the Lisbon Treaty by mentioning EU agencies in twenty-five (new) general provisions integrated them into primary law “after years of having a legal blur regarding their status” (Comte 2010, 385). Other scholars however stressed that despite these provisions the Lisbon Treaty did not establish a legal basis for agencies nor defined what kind of powers and how much discretion they can be delegated (Scholten and van Rijsbergen 2014). Legal scholars, generally sympathising with functionalist perspectives when analysing the creation of EU agencies, consequently considered the *Meroni* doctrine<sup>19</sup> as the (only) main legal constraint when delegating powers to EU agencies (Chiti 2009). In line with the *Meroni* doctrine, all EU agencies exercise implementation and not direct rule-making powers (Busuioc 2013). At the same time, they have become “a significant component of the functioning of the EU system” (see for instance Barbieri and Ongaro 2008, 395).

An additional milestone in the EU agency literature is the law-oriented study by Edoardo Chiti (2009). The author examined the main features of these institutional bodies and described their possible future development. With regard to the agencification process, Chiti outlined two main relationships: one between EU agencies and national administrations; the other between EU agencies and the Commission, emphasising in the latter case that, although these agencies are subject to several powers (mainly to the Commission), their functions should not be underestimated. He specified that in certain policy sectors the Commission’s decision-making powers rely formally on the activity of EU agencies, thus underpinning one of this dissertation’s assumptions that the development of agencies impacts the EU decision-making (Chiti 2009, 1405; see also Horii 2016). Relatedly, other scholars argued that the everyday relationship between agencies and the Commission, in particular the Commission’s DGs, has been undocumented so far and that more empirical research in this field is needed (Egeberg, Trondal, and Vestlund 2015). The Commission exercises major controls on the EU agencies acting in the different policy sectors under its DGs, by giving opinions on the agencies’ working programmes or by conducting evaluations on their activities (e.g. Chiti 2009). This explains why some scholars applying the P-A framework tend to regard the Commission as the first principal of EU agencies (e.g. Curtin 2005).

According to other authors, the substantial (*de facto*) influence that agencies have is also due to

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<sup>19</sup> Case 9/56, *Meroni & Co., Industrie Metallurgiche S.p.A. v. High Authority of the European Coal and Steel Community*, [1957] ECR 133. The *Meroni* doctrine limits delegation to outside bodies to purely executive powers.

the lack of expertise of the European Commission and the fact that disregarding the agency's opinion would end in cumbersome and additional work for the Commission itself (Ambrus et al. 2014, 389). The European Commission proposed setting up decentralised agencies in order to delegate part of its technical tasks and focus on its core functions. As Ambrus et al. (2014) highlighted, the result was that agencies have increased their expertise and technical know-how, whereas the Commission and other EU institutions as the Council and the EP have become more dependent on the technical expertise of these bodies with regard to issues falling within their mandates. Against this background, it is plausible to ask if and how far EU agencies have been empowered and which consequences this has for policy-making at the EU level. The importance of agencies in the EU was also signalled by Arras and Braun (2017), who constructed a new dataset to examine why and how the 31 EU agencies<sup>20</sup> involve non-state stakeholders, such as trade unions, non-governmental organisations (NGOs) or business associations, in their operational activity.

Against this literature, in the next sub-sections I review first those studies that specifically deployed the P-A model to explore delegation to then turn to the literature analysing Frontex's and EASO's mandate in particular.

#### ***1.1.1.1 Literature on the Principal-Agent Approach***

This section presents existing studies specifically deploying the P-A model to explain delegation. Scholars have hitherto explored the phenomenon of ever expanding European governance (e.g. Pierson 1996; Sandholtz and Stone Sweet 1998) as well as the establishment of agencies across the EU (e.g. Busuioc, Groenleer, and Trondal 2012; Rittberger and Wonka 2013), but they have not engaged in a systematic analysis of these phenomena from a P-A point of view. The existing P-A literature was key for the development of the dissertation's theoretical framework and identification of the theorised causal mechanism (presented in Chapter 3). The model finds its origins in the study of economics, with a specific focus on the notion of transaction costs. The contributions by Moe (1984) and North (1990) paved the way for numerous studies in political science examining delegation and agency through the lenses of P-A. Approximately two decades ago, the P-A approach, which had flourished under the auspices of American academia, crossed the Atlantic and scholars started to deploy the model in European Union analyses (e.g. Bergman 2000; Elgie 2002). The main goal was to understand the growing importance of EU institutions by using a new toolkit and thus abandoning the traditional theoretical landscape of "isms" (e.g. Pollack 2017), which dominated the debate at that time. *Neofunctionalism*, *intergovernmentalism* and *supranationalism* were back then (and are partially still today) the most enticing theoretical approaches when

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<sup>20</sup> Those agencies that were operational on 1 January 2015.

engaging with the study of the EU and its multifaceted character.

Over the years, the P-A approach has been more and more deployed by scholars with particular reference to the EU system, allowing to explore the different “engines” behind delegation, its *why*, *how*, and possible consequences (e.g. Pollack 2003; Tallberg 2002). Thereby, P-A research on the EU has reached a certain “cumulative strength” (Tallberg 2002, 24). Nonetheless, Kassim and Menon stated in the early 2000s that scholars had not exploited the full potential of P-A and that integration theories and theories borrowed from the IR tradition (such as historical institutionalism or liberal intergovernmentalism) showed weaknesses when applied to the EU system (Kassim and Menon 2003). Moreover, Dehousse (2016, 58) noted that a major failing within the literature that deploys the P-A model to explain the EU complex machinery is the insufficient attention to the peculiar existence of multiple principals. In contrast, this study puts the issue of multiple principals (and multiple agents) front and centre.

Scholars have already problematized the limited attention that was given to European agencies when applying the P-A approach and the related issues about the existence of *multiple* principals (Kassim and Menon 2003, 134). Starting from the 1990s, scholars argued that the main actors in the EU were its MS and consequently, the main researched process was the bargaining among them characterised by specific power politics and national preference formation (see also Moravcsik 1993). Academia thus modelled the EU system by drawing on rational-choice and assigning an essential role to the (back then) EC members. Keeping MS at the centre of one’s EU analysis is a justified rationale, since the EU would never have existed without MS delegating it their authority. Even today, the contemporary compound EU system would not be able to operate without them. Nonetheless, the developments of the last decade show that MS are no longer the only key players in EU policy-making and that the role of supranational institutions and bodies has grown. Authors have defined the EU as “less than a [federal] state, but far more than a traditional IO” (Wallace, Pollack, and Young 2014, 4), a definition that keeps entailing the prominent role of MS, but also the increased relevance of the EU as an influential actor in its own right.

Contemporary articles reviving the P-A approach to explore the EU have maintained the intergovernmental dimension at the centre of their analysis. Especially after the latest crises and their repercussions, MS seem to matter more than ever and national positions have been accordingly given increased attention (*ibid.*), leaving out the role of other institutions.

In the special issue edited by Niemann and Zaun (2017), the *raison d’être* and added value of the European integration project are called into question. One of the special issue’s contributors draws on P-A arguments to stress how MS’ preferences mattered for the EU ultimate response to continuous and severe deficiencies of border protection and asylum during the Schengen crisis

(Ripoll Servent 2018). The author insists that the distinction between northern and southern European MS is of the utmost importance to determine which MS actually act as principals and which not, since not all MS are according to her research automatically principals. Ripoll Servent's findings lead to the conclusion that MS' interests and positions played an essential role in strengthening delegation to Frontex and EASO, which are both, in the author's opinion, acting as the MS' "proxies".<sup>21</sup> Although the author offered an interesting perspective on the influence of MS' interests on the mandate of the two migration agencies, the analysis did not investigate in detail these bodies' development nor did it evaluate the involvement besides MS of other important institutional actors at the EU level.

The role that agents play in shaping policies and how their development matters needs to be reassessed in the light of contemporary findings. An increasing number of studies acknowledge that shared policy areas between MS and the EU are expanding (e.g. Beach 2016). The gap between ever expanding EU policies and the strong intergovernmental character of other (new) policies had already been addressed by Tanja Börzel in her 2005 article. In this contribution, the author challenges neofunctionalist perspectives and introduces the difference between level (referring to the number of issues falling under EU competence) and scope (referring to the involvement of supranational bodies). Partially related to the distinction between level and scope is the article by Dijkstra (2017), who introduced the concept of non-exclusive delegation. The author used P-A perspectives to argue that within the Common Foreign and Security Policy (CFSP) MS did indeed delegate functions to the EU (specifically to the High Representative and the European External Action Service, in short EEAS), but they simultaneously continue to carry out these functions themselves. This dual behaviour is defined by Dijkstra as *non-exclusive delegation*.

Another contemporary study extending the P-A model to the analysis of indirect governance, identifies four possible P-A relations: delegation, trusteeship, cooptation and orchestration (Abbott et al. 2018). The authors define the concept of *orchestration* as the relation between an orchestrator (principal) and an intermediary (agent), in pursuit of shared governance goals within a non-hierarchical context. The orchestrator-intermediary (O-I) theory (Abbott et al. 2016) that echoes Majone's article on delegation and fiduciary relation in EU governance (Majone 2001), sought to integrate P-A theory and fill the gap about the so-called *competence-control* trade-off. O-I theorists argue that P-A focuses on *hierarchical* delegation and lacks to offer an in-depth analysis of the "governor's dilemma" that lies in the mentioned trade-off (Abbott et al. 2018). The definition of

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<sup>21</sup> The notion of "proxy" refers to the assumption that these agencies are continuously subject to intergovernmental battles, where strong regulators such as France, Germany, the Netherlands, Sweden and the UK, are more likely to influence the agency's institutional design than other EU countries (ibid., 7).

competence given by O-I theorists refers to the capabilities that agents can contribute, in order to achieve the principal's goals. These capabilities are expertise, legitimacy, credibility, and material resources (ibid., 4). O-I theories and related publications were particularly useful to integrate the 'empowerment' conceptualisation by Heldt and Schmidtke (2017) for both the definition of a *significant* agency empowerment and the theorisation of *intermediate principals* and *multiple agents* as presented in the upcoming section.

In the light of the presented literature, P-A studies suggest three main characteristics of the complex web of P-A relationships in the EU: (1) the absence of a single ultimate principal, (2) a co-existence of control mechanisms, and (3) the occurrence of 'reversed delegation'<sup>22</sup> (Brandsma and Adriaensen 2017; see also Ripoll Servent 2018).

The aim of this dissertation is to advance these analyses further by paying attention not only to the MS' positions, but also to the *circularity* of the P-A relationship, entailing that the supranational agents can eventually determine a significant agency empowerment and thus affect the principals' decisions. As a result, I refer to the dynamic character of numerous interlocking relationships between multiple principals and multiple agents, where principals and agents are mutually constitutive and defined by the relationship they have to each other (Hawkins et al. 2006, 7). In the specific case of the EU and its cumbersome shared migration policy, P-A relations are not simply vertical and static transferring authority from one or more principals to one agent as theorised in the existing literature. On the contrary, I assume that over time and given a certain context, the multiple agents themselves have gained authority and reverberated this increasing authority back on the principals, affecting their decisions.

In a nutshell, the P-A approach has primarily been used in EU studies to explain the relations between EU MS (the principals) and EU institutions (the agents) (Dür and Elsig 2011; Kassim and Menon 2003; Pollack 1997). According to P-A studies, MS delegate for many reasons, but mainly because of the co-operation enhancement that they expect from it.<sup>23</sup> Despite extensive P-A research in the last twenty years, academia left out two important aspects of delegation when including EU agencies in the overall picture, namely the multiple character of EU agents and the overlapping roles between EU principals and agents. The general understanding is that when a single agent has more than one contract with distinct principals, that agent is subject to the control of *multiple* principals. When different principals *design* and exercise authority over a common contract for one

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<sup>22</sup> More details on this concept follow in section 2.1.

<sup>23</sup> With regard to the specific EU system, EU scholars usually distinguish further between macro-delegation as represented by the European Treaties, through which MS delegated authority to the EU, and micro-delegation, which rather occurs in the day-to-day decision-making process (Dür and Elsig 2011).

agent, scholars refer to a *collective* principal (Lyne, Nielson, and Tierney 2006, 44; see also Nielson and Tierney 2003). Nevertheless, as this study explains, this distinction blurs when examining the principals of EU agencies.

Scholars have highlighted the challenges that the P-A model faces in keeping up with contemporary European politics and in consequently remaining a useful explanatory tool (e.g. Delreux and Adriaensen 2017b; Egeberg and Trondal 2017). Following this line of research, the dissertation seeks to offer a comprehensive picture of the decision-making process in EU migration policy in order to clearly identify the processes of delegation in this multifaceted area.

### ***1.1.1.2 Frontex***

There are quite a few works exploring Frontex's establishment and activity. Detailed analyses on the establishment of the agency and on its subsequent development are to be found in Neal (2009), Léonard (2010), Ekelund (2014), Wolff and Schout (2013), Carrera and den Hertog (2016) as well as in Horii (2016).

Neal's article (2009) on the link between Frontex and the securitisation of the European borders uses the agency as a case study to retrace the development of EU security policies. Neal, similar to the previously mentioned neofunctionalist perspective, identified the main causes for the creation of Frontex in the 9/11 attacks and subsequent terrorist fears among MS. The specific link between Frontex's activity and the securitisation of migration in the EU has also been analysed by Léonard (2010), who deployed a sociological approach to explain how the activities of Frontex could be seen as 'securitising practices'. She claimed that Frontex's main activities had contributed to the ongoing securitisation of migratory flows coming to the EU and concluded that future studies should engage more in assessing to which extent Frontex might be considered an "autonomous actor" in the EU migration policy (Léonard 2010, 247). Conversely, Ekelund (2014) traced the process leading to the establishment of Frontex using a much more critical tone. The author turned to the analysis of social as well as historical processes to explain agency creation. The main argument is that efficiency and cost-effectiveness concerns led to the creation of Frontex rather than the need to gather technical expertise (Ekelund 2014, 111–12). On the contrary, Wolff and Schout (2013) stated that EU agencies are expert-driven bodies and that MS endorsed Frontex particularly because it offered, among other things, a network of training experts.

Right in the midst of the crisis, Carrera and den Hertog (2016) issued a paper on the Commission's legislative proposal of 2015 to set up the EBCG. The proposal was approved in September 2016, when the Council and the EP created a new agency although keeping the old

acronym 'Frontex'. Carrera and den Hertog's analysis criticises the proposed changes, since the envisaged "Frontex+" as they renamed it would not, in their opinion, solve the main problems that the "refugee crisis" uncovered (Carrera and den Hertog 2016). A previous analysis on Frontex had been issued by Carrera in 2007 already highlighting the conundrum between a de-politicised Frontex on paper and the highly politicised environment the agency had to act in (Carrera 2007). This specific issue was picked up on again by Biermann and colleagues (2017) when analysing the Schengen crisis of 2015-16. The latter argue that both major crises (the Euro and the Schengen crisis) have led to "unprecedented levels of politicization" as well as to a consequent backlash to national solutions rather than supranational ones (Biermann et al. 2017, 2). However, the authors did not engage in an accurate analysis of Frontex in the light of these insights, as is conversely the purpose of this dissertation.

With regard to the new EBCG, a contemporary investigation of Frontex's 2016 reform has been carried out by Niemann and Speyer (2018), who revive neofunctionalist assumptions and offer a more optimistic interpretation of the agency's reinforcement. Finally, Parkes (2015) published a contribution on the EU border policy in general, specifically exploring the different agendas of the Council, the EP and the Commission in this area. He thereby used Frontex's 2011 amended mandate as a case study to show how co-decision affected the border agency's accountability.

The existing articles on the establishment and activity of Frontex raise questions on the link between the agency's increasing competences, role and resources and the other actors involved in the decision- and policy-making of the EU. Academia has not yet covered the black-boxed delegation chains between the EBCG and other institutions. Such a research endeavour would shed light on the actual role of the agency and hence lead to a greater understanding of whether it has undergone a significant empowerment within the migration policy realm. One study engaged so far in systematically assessing the cognitive/informative impact of the EU migration agency Frontex. By examining the agency's work with a specific focus on its risk analyses, which Frontex issues at regular intervals, Horii's article (2016) seeks to show the consequences of the border agency's activity on the EU policy-making. Horii's assessment of one of Frontex's core functions demonstrates that the agency's work has had an impact on the overall EU external border management. According to the author's argument, the agency does not simply gather information but has an important political effect, since its work has been concretely used in the policy-making process. Risk analyses and working arrangements to support border management co-operation are key drivers of Frontex's activity and have gained importance in guiding decisions at the EU institutional level. By analysing how the agency's risk analyses "may exercise influence" on the



decisions regarding EU border management, Horii (2016, 1ff.) identified Frontex's tasks as a "form of power". She referred specifically to Barnett and Finnemore's (1999) definition of IO 'power' when arguing about the importance of Frontex's information-gathering task.<sup>24</sup> Horii's conclusive argument was that the role of Frontex with regard to *risk* and *securitisation* within the EU border management as a policy-implementing actor could be as important as the one of decision-makers in determining decisions. By specifically exploring how Frontex has influenced the allocation among EU MS of the EU External Borders Fund, she claimed that the agency's risk analyses have not only impacted political decisions but also legitimised those decisions, which the European Commission took with regard to border control. Horii's contribution highlighted for the first time the probable implications of a EU migration agency's activity for the EU decision-making process, demonstrating the inevitable link between Frontex's activity and the decisions taken by the Commission.

The dissertation seeks to further develop these findings by investigating what exactly triggered a significant empowerment of Frontex and how its role has grown in a policy area of shared competence.

### ***1.1.1.3 EASO***

There are still very few studies on the 2010 established Support Office. Scholars seem to have engaged more in the analysis of Frontex not only because the border agency covers a longer period of time – thus facilitating a comparison between the past and the present – but also because of its controversial activity. Before Frontex's mandate was amended in 2011 and after the agency had been highly criticised by public opinion with regard to its operations at the EU southern maritime borders,<sup>25</sup> scholars were drawn to this critical research topic rather than to the investigation of the newly established and weakly structured EASO (e.g. Carrera 2007).

One of the few authors engaging in a detailed analysis of the Support Office is Comte. Comte's article (2010) on the fledging asylum agency was published only a few months after the setting up of EASO and is accordingly characterised by a rather enthusiastic undertone. Although the author described the hurdles faced by the EU before creating the Office, his conclusions were quite optimistic, stressing the novelty of this body in a policy sector "where no one would have thought possible 10 years ago" (Comte 2010, 404). The author defined EASO as an ambitious project,

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<sup>24</sup> Barnett and Finnemore emphasised that IOs do not simply facilitate co-operation among states, but that through the classification of information and the creation of social knowledge, IOs actually exercise power (see Barnett and Finnemore 1999).

<sup>25</sup> The public opinion's criticism was raised by highly controversial joint border operations performed by Frontex in the Mediterranean Sea, such as operation *Hera* (*Hera* I and II in the Canary Islands), operation *Nautilus IV* and operation *Hermes* during which third-country nationals detected on the high seas were forcibly returned to Senegal, Mauritania and Libya (cf. Carrera 2007; Keller et al. 2011).

despite its limited mandate, since its tasks touch upon core national administrative functions in a highly sensitive issue area, a fact that makes the very existence of this office even more impressive. A further interesting short work outlining the potential of the Support Office, is a comment written by Angenendt and Parkes (2010), who analysed the blueprint set out by the EU Regulation 439/2010 for a European Asylum Support Office before the fledgling agency became operational. The comment highlighted the most relevant steps leading to this regulation: first, EU MS identified the necessity for a CEAS to ensure that responsibility-sharing with regard to asylum would be more equitable. Second, in 2007 the EU Commission had presented an asylum strategy already foreseeing the establishment of a Support Office, since a simple agreement between MS on common legal standards would not have been sufficient to get the CEAS underway (Angenendt and Parkes 2010, 2). Although the comment leaked some scepticism about the effectiveness of the future office, Angenendt and Parkes outlined the probability of a strong EASO, since “it would be strange [...] if the member states created this office only to keep it weak.” (Angenendt and Parkes 2010, 4). Both advocated that the MS invested in the office, in order to gain something from it.

During the turbulent years of the migration crisis, Tsourdi (2016) engaged in the exploration of EASO’s ‘key operational role’ in the hotspots by specifically looking at the case of Greece. The author, after critically assessing the agency’s mandate, turned to the Support Office’s operational activities by focusing on its interactions with Greek national administrations on the ground. She concluded her paper by asserting that EASO had evolved from being a structure offering mere practical support to a key actor that *de facto* moved towards a joint and common asylum process. Her paper suggests that these *de facto* changes call for a *de jure* transformation of the agency’s mandate, in order to foster the institutionalisation and further supranationalisation of the asylum policy as well as to advance the implementation of the CEAS. A further contemporary analysis of the envisaged reform of EASO into a new EUAA was issued in 2018 by the Expert Council’s Research Unit of German Foundations on Integration and Migration (Schneider and Graff 2018). The text offers a general overview of the main changes that the reform would introduce in EASO’s current mandate and how far the new EUAA, if established, could guarantee a standardised protection system.

### **1.1.2 Literature on EU Migration Policy**

The second analysed strand of the literature investigates the evolution of a common EU immigration, border control and asylum policy within the broader AFSJ. When looking at the vast delegation literature, the predominant explanation for the development of such a policy is (from a

neofunctionalist perspective) the abolition of internal borders and the fact that security has increasingly become the new *raison d'être* for harmonising external border controls (Geddes 2008). According to most studies, the AFSJ therefore still presents an “intergovernmental bias”, which has led to security-oriented policies over time (Ripoll Servent and Trauner 2014, 1142). At the same time, a further claim has emerged among scholars, namely that the EU migration policy is characterised by a “liberal constraint” (Bonjour, Ripoll Servent, and Thielemann 2017, 3ff.; Kaunert and Léonard 2012b). The liberal constraint proponents expect that while MS assume restrictive positions when it comes to migration issues, supranational institutions, i.e. the Commission, the EP, and the ECJ, advocate more liberal ones. Critics have nevertheless often considered this new perspective as over-simplifying (Bonjour, Ripoll Servent, and Thielemann 2017). Although contemporary comparative analyses claimed that the ‘policy cores’ of the AFSJ have maintained a “high level of stability regardless of the introduction of the Community method” and that no significant policy change was achieved (Trauner and Ripoll Servent 2016, 1421), the empowerment of institutions (institutional change) in EU migration governance and their growing influence in this policy field cannot be denied.

For the purpose of this dissertation in general and the corresponding literature review in particular, it is relevant to briefly mention the most important stages of the development of the AFSJ, on which I elaborate in greater detail in the upcoming Chapter 3. As soon as the Schengen Implementing Convention abolished the EU’s internal borders establishing the Schengen Area in 1990, MS started a EU security and justice co-operation. Progressively, first the Maastricht Treaty (1993) and then the Amsterdam Treaty (1999) fostered the idea of a future AFSJ taking over competences of the Justice and Home Affairs (JHA) domain. The JHA pillar had been created because of the concern MS had about massive post-Cold War migration flows coming from countries of the former Soviet Union (Geddes 2018, 122). The ‘Area of Freedom, Security and Justice’ dealing with issues on the security of the EU citizens as well as with migration and external border control was eventually officially enshrined in Title V of the Treaty on the Functioning of the European Union (TFEU) with the entry into force of the Treaty of Lisbon (2009). Additionally, over the past twenty years, three five-year programmes have been subsequently agreed on to develop the AFSJ: the Tampere programme (1999-2004); the Hague programme (2005-2009); and the Stockholm programme (2010-2014).

The AFSJ took over competences from JHA, a domain which was initially strictly a national competence (for a detailed account on the evolution of the JHA policy domain see Lavenex 2014). After the creation of a Single European Market in 1986 and the establishment of the Schengen area,

competences in the field of JHA gradually shifted to the European level. Although several aspects of this domain remain a shared competence between the national and the supranational level, integration in this area has proceeded incrementally over the years.

The specific features of the former JHA and the inherent migration policies have been investigated by scholars especially starting from the early 2000s (e.g. Boswell 2003; Guiraudon 2003; Schain 2009; Stetter 2000; Wunderlich 2012). Stetter's article (2000) is at the interface between the previous analysed delegation literature and scholarly works on the JHA (future AFSJ). The author concentrated on migration policies (that is policies concerning border controls, asylum, immigration and refugees) and sought to offer a new theoretical model building on regulation as well as P-A theories to explore the dynamics of policy-making in the mentioned area. Stetter highlighted with some caveats that the literature had usually given only two explanations for the integration process in the migration area: first, an economic explanation and second, an historical/demographical one. The economic explanation, linked to neofunctionalist theories, argues that since the Single European Act (SEA) of 1986 and the following introduction of a Single European Market, co-operation among MS in the migration area has been an inevitable consequence complementing the economic one (see also Geddes 2008).

The historical/demographical explanation goes back to the increasing migratory pressure starting in the 1980s and builds on the subsequent EU MS attempts to erect a "fortress Europe" (Stetter 2000, 81). Against this backdrop, Stetter offered an alternative explanation. He argued that the legal communitarisation of migration policies had occurred because national governments wanted to overcome previous credibility and co-operation problems. Delegation to the Commission and other supranational institutions therefore appeared as the best solution. Throughout his paper, Stetter did not explicitly mention EU agencies, suggesting that at the time the article was published (in the early 2000s), the possible establishment of future agencies in this area had not been taken into account yet. Stetter was one of the few scholars to apply a P-A approach (integrated with regulation theories) to the EU migration policy field. Much has changed since his article was published, but the P-A model can still be a useful tool to address this topic.

Studies on the development of EU migration law and policy are manifold, giving a useful insight into the historical pattern this area has undergone (Geddes 2008; Hailbronner and Thym 2016; Lavenex 2006; Peers 2008; Ripoll Servent and Trauner 2014). Bonjour, Ripoll Servent and Thielemann (2017) have painted an interesting canvas for a new research agenda on EU migration policy and politics in general. The same year, Guiraudon (2017) argued in her paper that despite the "refugee crisis", which should have disrupted the whole Schengen system, the *status quo* prevailed. By deploying a socio-historical perspective, she claimed that the crisis was not a 'turning point' as

the media and parts of academia had forecast. She highlighted that the crisis had given reason for a widespread phenomenon of naming and shaming against the Schengen and Dublin system as well as the specific activity of some EU institutional bodies such as Frontex. Guiraudon's analysis echoes theoretical assumptions of historical institutionalism and expected path dependent dynamics (for a further elaboration see sub-section 6.2.1). The critical juncture that Guiraudon identifies does not coincide with the crisis of 2015-16 (whose reverberations are still observable today, although most scholars seem to agree that the crisis ended in 2016), but rather corresponds to the policy choices taken in the 1990s, when security concerns determined the development of a common area of migration at the EU level through the signature of the Schengen and Dublin agreements.

Geddes (2018) developed Guiradon's findings further. The author distinguished four main dimensions of potential change, which partly seem to coincide with the classic distinction between policy, polity and politics. The first dimension corresponds to the change in the drivers of migration, depending on the understanding that decision-makers and the public have on the subject. The second dimension is the change in EU policies, which corresponds to changes in the content of negotiations and co-operation among EU MS (*policy* change). Third, Geddes outlined the greater role of EU institutions, which are increasingly involved in the realm of migration (*polity* change). With regard to this third dimension, the author explicitly mentioned not only the greater role of the European Commission when it comes to migration issues, but also of EU agencies, that is the EBCG and the potential future EUAA (*ibid.*, 121). Finally, the fourth dimension reflects the changes in the *politics* of migration, in particular the processes among the public attitude towards migration.

Despite the past and present relevance of the migration policy area and the related sub-policies, the specific linkage between the setting up of EU decentralised agencies with delegated powers and the development of a common migration, asylum and external border control policy has received limited attention thus far. Numerous political science scholars have engaged in analysing the migration crisis in light of existing theories. As highlighted by Niemann and Zaun (2018, 3), who edited a special issue that aims at offering a "first systematic assessment of the crisis", the crisis has had the potential to seriously undermine the EU integration process. Hence, researchers have an academic duty to report on the crisis' implications. Specifically, the authors drew attention to the gap between set and implemented goals in the AFSJ and to how it has continuously widened over the years leading to a phenomenon that can be described as an uneven process of policy development.<sup>26</sup>

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<sup>26</sup> Carrera and Guild (2014) relatedly argued that this gap specifically exists between the European Council's guidelines

The authors of Niemann and Zaun's edited special issue further agreed that "systemic factors rather than the increased inflow of asylum-seekers caused the crisis" (ibid.) and that contributions on this significant topic have been so far limited. The special issue gives primarily credit to European integration theories in general and to the intergovernmental perspective in particular, considering EU MS and their national interests as the main puppet masters in the integration process. Conversely, this dissertation wants to look at the role of EU institutions by adapting the P-A model to the chosen context.

A further pivotal contribution on EU asylum policies has been published by Zaun (2017). She introduced an 'actor-centred' institutionalism as her theoretical framework to investigate policy-making in the asylum area, critically arguing that EU MS decided not to take on responsibility and to shift it to neighbouring countries. Again, MS are at the centre of the analysis. The national interests have also been in the research focus of academics when addressing issues related to the cleavage between the EU as a regulatory system and redistributive policies. Börzel (2016, 9), for instance, asserted that the refusal of MS "to honour their financial and legal commitments is mostly due to increasing politicization driven by the rise of populist forces that mobilize illiberal, nationalist ideas of Europe against the redistributive effects of many EU crises policies.". Some other scholars tried to argue that the EU reaction to growing asylum related challenges was not as passive as claimed by critics, since it did step up funding to address the migration emergency and created specific hotspots to support frontline MS (Monar 2015b). Most of the literature seems however to agree that measures taken by the EU during the challenging years of 2015-16 were inadequate.

Scholars have already raised the question whether MS keep holding the upper hand or if EU institutions have been instead "empowered" when it comes to policy issues such as migration (Geddes 2015, 73).<sup>27</sup> In the aftermath of the EU crises, scholars as Genschel and Jachtenfuchs (2017) argued that despite distributive conflict among MS and politicisation of relevant issues at the domestic level, both the Euro and the Schengen crisis "triggered an outburst of joint decision-making" (Börzel 2016 quoted in Genschel and Jachtenfuchs 2017, 188).

With regard to the migration crisis specifically, authors also claimed that the 'strong regulators' (in Ripoll Servent's (2018) words) among EU countries have predominantly influenced the

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and the strategies put forward by the Commission and the EP, primarily because of the deficits in the national systems of the EU MS.

<sup>27</sup> In their book on the politics of migration and immigration in Europe, Geddes and Scholten (2016) constructed an entire chapter around the two hypotheses whether MS are losing control to the EU in the migration policy sector or whether, on the contrary, MS deliberately 'escape' to Europe to avoid domestic and political constraints. This last hypothesis echoes the 'venue shopping'-logic developed by Guiraudon (2000; see also Bonjour, Ripoll Servent, and Thielemann 2017).

decision-making process due to their smaller win-set and their consequent higher level of bargaining power (ibid.; Schimmelfennig 2015, 90ff.).<sup>28</sup> These MS had interests that were closer to the *status quo* and thus benefited from a stronger position compared to those states, such as Italy, that advocated more solidarity and capacity building, because they were directly exposed to the impact of the migration crisis.

Another strain of scholarly work has tackled together questions regarding the two biggest crises that the EU had to deal with in the last ten years: the Euro and the Schengen crisis (e.g. Biermann et al. 2017; Schimmelfennig 2018). Schimmelfennig (2018), for instance, traced a comparison between the European Central Bank (ECB) during the Euro crisis on one side and Frontex and EASO during the Schengen crisis on the other. The author defined the reform of Frontex into the new EBCG as the only form of a ‘deepening of integration’ in the aftermath of the Schengen crisis, while at the same time arguing that both Frontex and EASO “have not acquired supranational competencies” (ibid., 981). A comparison between the Euro and the Schengen crises in institutional terms is troublesome not only due to the different degrees of integration the two areas have reached, but also because the two migration agencies are not ‘equals’ to the ECB. The conclusive argument that the Euro crisis and the Schengen crisis have led to two different integration outcomes (in the first case more, in the second case less) calls for further insights into the distinct histories of the two policy areas under focus, which had already shown different integration degrees before the occurrence of the respective crisis.<sup>29</sup>

Although such contributions prove useful when looking at the Euro and the Schengen crises in perspective, they just seem to scratch the surface of a very intricate institutional landscape. In order to dive deeper into the outlined topic, this dissertation focuses on the migration policy only, in order to grasp the nuances of this policy after the Schengen crisis.

The crisis has caught the attention of researchers as has the significant development of Frontex and the overall role of EU agencies. Nevertheless, the literature still misses a P-A-driven analysis comparing the development of agencies in EU migration governance and showing how such a development takes place. Furthermore, as outlined above, especially those studies engaging with neofunctionalist and intergovernmentalist theoretical assumptions put the MS’ *preferences* at the heart of their argument and compare the consequences of a crisis in two very distinct policy areas

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<sup>28</sup> Genschel and Jachtenfuchs (2017) also use the concepts of ‘fortunate camp’ *versus* ‘unfortunate camp’. The former notion refers to those countries in the EU that did not take the “brunt of the crisis”; the latter camp is represented by those MS that during both the financial and the migration crisis had to bear relatively higher costs. The authors refer to these ‘unfortunate countries’ as “debtor countries, states with exposed borders, overrun host states” (Genschel and Jachtenfuchs 2018, 187).

<sup>29</sup> Whereas integration is deep and high in the economic and monetary policy sector, where the EU enjoys “quasi state-like powers” (Genschel and Jachtenfuchs 2015, 3), the two migration policies of border control and asylum are still highly sensitive issue areas and only partially supranationalised.

(i.e. the monetary policy and the migration policy). For the purpose of my research, I analyse the *positions* as stated in official documents rather than the *preferences* of MS during the Schengen crisis. My aim is to shift the attention to the role of EU institutions and how they are entangled with national authorities in the EU decision-making process. In addition, this study zooms in on two sub-policies within the same broader AFSJ, in order to gain detailed insights into the development of institutional bodies shaping this area and to throw light on the black-boxed mechanisms behind delegation. By using the abovementioned studies as a launching pad, the dissertation seeks to go a step further and evaluate whether it was actually the crisis of 2015-16 to trigger a significant empowerment of EU migration agencies and if so, which were the specific mechanisms behind such a change.

## 1.2 Research Question and Puzzle

Whether the Schengen crisis triggered a significant empowerment of migration agencies and how such empowerment occurs in the sub-policies of border control and asylum is the research question of this study, which builds on the relevant contemporary changes the EU is witnessing. For more than a decade now, the EU has dealt with major emergencies and pitfalls. First the Euro crisis, then the Schengen crisis followed by the Brexit vote as well as the concomitant rise of nationalist, right wing parties in various MS.<sup>30</sup> Though some authors argue that the Schengen crisis has raised important questions about the ‘absence’ of a common EU migration policy (Geddes and Scholten 2016), this area has been continuously supranationalised ever since the Tampere Council of 1999.<sup>31</sup> In the last two decades, the European Commission, the Council and the EP have established and gradually expanded on behalf of the EU MS the resources of the two main agencies acting in the sub-policy sectors of border control and asylum (based on the guidelines set by the European Council). Instead of a return to national authority and state sovereignty, the European Commission was able to enhance the role of supranational institutional bodies to combat the crisis – at least in the short term (see Carrera et al. 2015). In the politically sensitive EU migration sector, however, the alleged phenomenon of significant agency empowerment entails important long-term implications. EU agencies as Frontex and EASO might still appear as institutional bodies that are merely implementing EU policies, but their developments as well as a deeper examination of their activities attest their enhanced role. Contemporary changes in Frontex’s mandate and the at least planned ones for the EUAA-to-be should not be underestimated, since they have strongly affected the institutional landscape of the EU. Within this landscape, scholars demonstrated that Frontex and

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<sup>30</sup> For instance, the democratic backsliding in Hungary and Poland.

<sup>31</sup> For further details see the presidency conclusions of 15 and 16 October 1999 available online under [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm) (last accessed on 11.12.2018).



EASO are not only advisory in nature as in the past, but that they are now provided with “limited decision-making powers” as well (Scipioni 2017a, 11). These transformations manifest themselves through a strengthened position of both agencies, which runs parallel with a reinforcement of the EU Executive, that is the European Commission.

Although one of the main reasons for establishing agencies was to create depoliticised institutional bodies and ensure the ability to make credible commitments, delegation is in itself, together with the authority that comes with it, a political matter. What implications does the strengthening of EU bodies that have to ensure co-ordination and co-operation between EU MS in sensitive policy areas have for the EU system as a whole? And is the enhancement of these agencies’ capacities an effective solution to prevent irregular migration? Although it is not within the scope of this dissertation to answer these additional questions, it is crucial for the researcher to keep the bigger picture in mind and to understand the major unsolved challenges that a ‘common’ migration policy entails.

Today, the borders to the outside world matter more than ever especially because the EU has abolished its internal borders allowing the free movement of people, goods, services, and capital within its territory. The enhanced control of borders should develop in parallel with a common approach to asylum, in order to find a European solution to migration challenges by strengthening solidarity not only between the MS of the EU, but also between the EU and countries of origin. These goals represent the cornerstone of the European project to establish a common migration policy and implement common standards and procedures for both the surveillance of the European external borders and the reception of migrants.

As stated by the German foreign minister Joschka Fischer in his famous speech of 2000 at the Humboldt University of Berlin, the answer that Europeans should give to the topical and recurrent question: “*Quo vadis Europa?*” should always be: “Onwards to the completion of European integration”.<sup>32</sup> However, Eurosceptic voices were back then already spreading and questioning the process of European integration, even as institutions in Brussels started integrating a EU-wide border management and a common asylum system with the aim of moving the integration process further. Traditionally, crises are considered as “open decision-making situations” (Schimmelfennig 2018, 969), during which supranational solutions should be favoured. In the specific case of the EU, the word ‘crisis’ immediately echoes the famous words Jean Monnet dramatically deployed in his *Memoirs* of 1978 to describe the challenging character of the European system by stating that ‘Europe will be forged in crises, and will be the sum of the solutions adopted for these crises’

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<sup>32</sup> For the English version of the entire speech see Speech by Joschka Fischer on the ultimate objective of European integration (Berlin, 12 May 2000) available online under [https://www.cvce.eu/content/publication/2005/1/14/4cd02fa7-d9d0-4cd2-91c9-2746a3297773/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2005/1/14/4cd02fa7-d9d0-4cd2-91c9-2746a3297773/publishable_en.pdf) (last accessed on 5.12.2018).

(Monnet 2015 as in Dinan, Nugent, and Paterson 2017, 336). Nonetheless, during the Schengen crisis, instead of agreeing on common European solutions, MS resorted to national ones<sup>33</sup> – some of them, such as Austria, France and Germany, by retaking control of the EU common open borders – and consequently failed to agree on necessary reforms for further integration (European Commission 2018a, 970). The first political reaction to the Schengen crisis seemed thus to be against further European integration (Hooghe and Marks 2018).

Though the EU and its MS were unable to advance integration as a common solution, the Schengen crisis worked as a catalyst for major institutional developments in the sub-policies of border control and asylum. This dissertation seeks to close the literary gap on the crucial links between asylum and border control policies (as outlined above in section 1.1), which are both two critical sides of the same coin, namely of a common policy on migration. In this study I assume that once a crisis breaks out MS are not responsible alone for the decision-making process regarding the EU capacity building. Despite MS' individual positions or rather because of them (as I illustrate in Chapter 4 and 5), supranational decisions are taken after the intervention of intermediate principals, i.e. the EU institutions, which allegedly lead to the significant empowerment of agencies in the aftermath of a crisis. So far, scholars deploying the P-A model or traditional EU integration theories have progressed along two levels: the (first) national level by focusing on the domestic interests and power politics among MS; and the (second) supranational level by investigating the main EU legislative, executive, and judicial institutions. Against this background, the third level, namely the allocation of increasing tasks and 'powers' to agencies in the migration area remains obscure and consequently requires additional research.

The research question addressed by this dissertation revolves around two issues. The first issue regards the enhanced role of agencies in the EU over the last decade; the second issue relates to the role of MS and EU institutions with regard to these agencies. Migration has turned into a key driver of EU policy-making ever since the 2015-16 Schengen crisis, a process in which the EU executive machinery as a whole seems to play a major role. Against this backdrop, the European Agenda on Migration<sup>34</sup> presented in 2015 by the Commission is a case in point. The Agenda set out three main changes. First, Frontex was reinforced in its activity and capabilities, in order to provide comprehensive operational assistance to the EU MS – specifically with regard to the joint operations (JOs) *Triton* and *Poseidon* in the Mediterranean Sea. Second, the Agenda introduced the

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<sup>33</sup> For instance, at the beginning of 2016, Austria's then former Foreign Minister and later on Chancellor of the country Sebastian Kurz stated: "There is still no European solution in sight. For that reason, it is necessary for us to take national measures" (Zalan 2016).

<sup>34</sup> Hereinafter also referred to as 'Agenda of 2015' or 'Agenda on Migration'.

*hotspot* approach: starting from June 2015, ‘hotspots’ were established in frontline MS, primarily Greece and Italy, where specifically trained personnel and dedicated facilities would ensure the screening, identification and fingerprinting of third-country nationals (TCNs) arriving irregularly at the EU external borders. As a result, members of staff from both Frontex and EASO have been increasingly deployed in these areas (Monar 2016, 138). Third, the European Commission presented the reform of the CEAS as a ‘package’ requiring *inter alia* the transformation of EASO into a fully-fledged agency.<sup>35</sup> Both an improved external border management and a ‘stronger’ common asylum policy thus became EU priorities (Monar 2016). Despite the supranational trend these changes suggest, MS still cling onto their core powers. For instance, during the migration crisis, countries such as Austria, Denmark, Hungary and the United Kingdom (henceforth UK) (the last two using their ‘opt-out’ rights from the AFSJ as enshrined in the Treaties) hindered decisions on a mandatory relocation scheme of refugees that had been established to relieve Italian and Greek bureaucracies. At the same time, the Visegrad Four (Czech Republic, Hungary, Poland and Slovakia) disapproved of any proposal to increase the number of relocated refugees (though Poland later lifted its initial objections) (*ibid.*).

Asylum issues are intertwined with the highly critical Dublin system, whose origins date back to the 1990s when refugee flows from former Yugoslavia increased (Geddes 2007, 122). The sheer core of the Dublin system requires refugees to seek asylum in the first country they arrive in, thus exacerbating existing imbalances between the MS’ asylum systems.<sup>36</sup> In general, MS have not respected the solidarity clause as enshrined in Article 222 of the TFEU (with regard to the essentiality of solidarity among MS for the development of a common immigration policy see also Commission of the European Communities 2008, 8).<sup>37</sup> Whereas the EU has continuously reinforced external border control, the CEAS is still struggling with its internal deficiencies (Lavenex 2018). Inspired by the referred P-A approach, the study identifies the drivers behind these diverging developments and traces systematically the events unfolding between the outbreak of the crisis in late 2014 and September 2018.

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<sup>35</sup> As pointed out by Schneider and Graff (2018, 3), this expression might be misleading, since EASO already legally fulfils all the criteria to be defined as a EU agency. More details follow in Chapter 5.

<sup>36</sup> In July 2017, the ECJ upheld the Dublin regulation despite the crisis MS were facing, due to the massive flows of refugees coming to the EU (Bell 2017).

<sup>37</sup> Title VII, Article 222(1) and (2) of the Lisbon Treaty (as in the consolidated version of the TFEU of 2012) states that: “1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: [...]

(b) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council. [...]”.

### 1.3 Political and Academic Relevance

Numerous independent bodies have been set up since the 1970s, in order to fulfil the task of assisting the European Commission. The consequent growing “polycentricity” of the EU Executive has been described as one of the most interesting developments of the past two decades (Dehousse 2016, 69). Initially, ‘executive agencies’ were established to relieve the Commission, which had been struggling with its burdened administrative capacity (Curtin 2005; Dehousse 2016). Later on, ‘decentralised agencies’, which perform technical tasks and enjoy more autonomy than the executive ones, allowed expanding the EU executive power without strengthening the Commission itself, since the member governments would not have agreed on such a reinforcement.

In its White Paper of 2001, the Commission paved the way for a European governance reform, opening up the policy-making process and introducing more autonomous structures, namely European Regulatory Agencies (ERAs),<sup>38</sup> by granting them powers in clearly defined policy areas (COM(2001) 428 final). These agencies – distinguishing themselves between the mere “Commission bodies” (Curtin 2005, 93), i.e. the abovementioned EU *executive* agencies and EU *decentralised* agencies, to which this research calls attention – are organisationally autonomous from the Commission, although acting under its aegis. The specific tasks carried out by Frontex and EASO were initially largely exercised by EU MS and delegated to them by the Council of the European Union (and eventually also by the EP). These agencies represent important decentralised instruments of the Commission to prepare and take decisions.

In the last three decades, EU agencies have increased in number and power within the landscape of the European Union (e.g. Scholten and van Rijsbergen 2014) while a common EU migration policy was developed by MS and EU institutions primarily driven by specific security concerns (Lavenex 2014, 371ff.).<sup>39</sup> Although this policy is, as so many EU policies, still blurred and under progress, the dissertation aims at systematically presenting its multiple actors and the power relations among them. The political relevance of the dissertation project stems from the need to shed light on delegation chains as well as specific developments within the common EU migration policy.

Beyond the issue whether the establishment of such institutional bodies was legitimate, counterproductive or not, the more interesting question arises under what conditions a significant

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<sup>38</sup> The Commission designates by the concept of ERAs “agencies required to be actively involved in exercising the executive function by enacting instruments which contribute to regulating a specific sector”. ERAs are created through a “horizontal delegation” i.e. their delegated powers are directly provided by a legislative act or a Treaty provision (COM(2002) 718 final, 4).

<sup>39</sup> For a critical interpretation of a ‘counter-development’ defined as the tendency to ‘de-Lisbonise’ JHA co-operation see Carrera and Guild (2014).

empowerment of EU agencies occurs in times of crisis. Political scientists and lawyers have regarded the two migration agencies Frontex and EASO as exclusively technical and operational bodies, since their official mandate and main *raison d'être* is to co-ordinate MS' operational activities. Nevertheless, as for today these agencies play a strong role in the EU decision- and policy-making process. The idea of this dissertation project started with a broader question on what competences the EU has within the area of migration and what it actually does. After engaging with academic work on European integration and its probable future after the migration crisis (Biermann et al. 2017; Börzel and Risse 2018; Lavenex 2018; Scipioni 2017b; Schimmelfennig 2018), I observed that scholars concentrated primarily on intergovernmentalist, (neo-)functionalist, or organisational sociological explanations. The reviewed studies were extremely enlightening and inspiring, yet, they did not completely answer the question. As presented in the previous section on the current state of the art, many issues have been touched upon: protectionist policies, internal security, MS' diverging interests as well as the notion of 'non-intentional hypocrisy' that flows from the cleavage between the EU's goals and its actual practices (Lavenex 2018). Although some scholars mentioned the "increasing empowerment of EU institutions" (Scipioni 2017b, 13), none of them systematically engaged in the operationalisation of the concept of supranational 'empowerment' and its implications for the future of a common European migration policy. Analysing the development of specific institutional bodies in this wide policy realm would allow researchers to understand better the current situation at the EU external borders as well as to make probable predictions about future changes in this area.

The fast developments following the Schengen crisis determine the importance of the research question I address. Notwithstanding national authorities taking formally final decisions for operational actions, the support and assistance agencies provide ineluctably impacts on the decision- and policy-making processes (Carrera et al. 2013). The dissertation offers not only general insights into the migration policy as a whole, but most importantly a detailed comprehension of the alleged institutional significant empowerment of migration agencies.

The events of 2015 and 2016 have shown the sensitivity of the two specific areas of border control and asylum. The division of powers between MS and EU institutions has always been contested, showing that delegation matters are still highly political and that "their study touches upon the essence of European politics" (Delreux and Adriaensen 2017a, 2). The political steps taken by the EU MS, the European Commission, the Council and the EP in the last two years testify the growing significance of border control and asylum issues. The agreement on a EU budget for 2016 close to a total amount of €10 billion (more than doubling the initial allocation) in order to address the crisis at the external border (Kamarás, Saunier, and Todaro 2016); the launch of the EBCG; the

proposal for a fully-fledged EUAA; and the approval of a hotspot approach are only some of the numerous central decisions that have been taken in the migration policy sphere after the crisis.

Against this backdrop, the dissertation makes three main academic contributions. First, it departs from the observations of Reykers and Beach (2017, 275–76), who advise researchers deploying the P-A model to move away from the common “input-output focus”<sup>40</sup> by translating the P-A relation into a causal mechanism. They argue that EU scholars have widely drawn upon the P-A model without unpacking it and thus overlooking the “interlocking” steps and mechanisms underlying any exemplified P-A relation. Therefore, following these suggestions, I seek to deploy the P-A model and its related assumptions while applying process tracing as a method, in order to trace the black-boxed steps of delegation between multiple principals (*primary* and *intermediate*) and multiple agents looking in particular at the role of the EU Executive in prompting institutional change. The ambition is to dive into the P-A tradition and adapt it to the specific EU context including agencies, by assessing non-rigid delegation relations and extending the P-A literature to a further contemporary topic.

The second academic contribution this study makes is to translate the concept of *empowerment* deployed in IR studies on IOs (Heldt and Schmidtke 2017) into the EU realm and then adapt it to a new set of actors, namely EU agencies.

Finally, the third contribution is closely related to the first one, since the research presents possible drivers of change in EU migration policy and empirically outlines the role of the numerous institutional players involved in the related decision-making process. The specific institutional ties between the mentioned agencies and other EU institutions – primarily the EU executive and legislative – have received little attention thus far. The EU has been described as “a multi-level polity striving for political union” (Lavenex 2018, 6) and the Schengen crisis has dramatically shown that this was mainly a crisis of the political. Moreover, one should be careful in claiming that the ‘crisis’ has ended, since reverberations of the 2015-16 emergency can still be observed at present (Interview with EASO Expert 1 2018; see also European Council 2018).

The next section presents the method applied, in order to trace the decisional steps leading from the Schengen crisis to the significant empowerment of agencies in the EU.

## 1.4 Methodology

The dissertation deploys a comparative, qualitative method. For each of the two individual case studies, i.e. the development of Frontex and the evolution of EASO, I follow a theory-testing

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<sup>40</sup> By input-output focus the authors refer to the widespread habit of P-A scholars to compare preferences of principals and agents with realised policy outcomes, instead of looking at the actual process “whereby agents *potentially* exploit their delegated powers for private gains” (Reykers and Beach 2017, 255 [emphasis added]).

process-tracing within case analysis. The original intent was to integrate the process-tracing method with qualitative research interviewing. In the end, I conducted five interviews with six distinct high-level experts, though more were planned. Out of twenty interview requests, many remained unanswered and those who agreed to be interviewed all refused to refer to further colleagues.<sup>41</sup> Although most of the interviewees were extremely helpful and accommodating, positive feedback after contacting multiple times the institutions in question through public channels fell short. As a consequence, the initially planned field research was limited by the minimal availability of experts or the lack of it as in the case of EASO. Nonetheless, I decided to integrate the gathered data with the information provided during the interviews I was able to conduct.

The following section presents the chosen methods, namely process tracing and qualitative interviewing, and the benefits of complementing the two.

#### **1.4.1 Process-Tracing: Adaptation of the Method**

Process tracing is all about analysing intermediate steps (see Bennett and Checkel 2014). It is a research method that uses *within-case*<sup>42</sup> empirical analysis to observe how a theorised causal process “plays out in an actual case” (Reykers and Beach 2017, 261). The deployment of the method can be guided by theory and aspires to explain why a specific outcome occurs in a particular case (Beach and Pedersen 2016b). Process tracing thus allows to explore the hypothesised causal mechanism between the identified trigger X (the crisis) and the outcome Y (a significant agency empowerment) as well as to determine further scope conditions (the institutional and policy-related EU context) within which the mechanism allegedly develops (e.g. Beach and Pedersen 2013). Specifically, the thesis deploys theory-testing process tracing,<sup>43</sup> in order to test whether there is evidence that the hypothesised causal mechanism is actually present in a given case by deploying existing theoretical assumptions (Beach and Pedersen 2013; George and Bennett 2005). This study accordingly traces hypotheses deduced from P-A theory and the entailed causal mechanism for each of the mentioned case studies.

Case studies<sup>44</sup> provide the tools to examine a causal mechanism in detail (George and Bennett 2005), while process tracing allows exploring whether there is such a causal connection between a

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<sup>41</sup> Two of the six interviewed experts worked together and asked me to conduct the interview with both of them simultaneously. I thus conducted 5 interviews in total out of 20 (anonymous and non-anonymous) requests.

<sup>42</sup> “When our research goal is to make strong within-case inferences about whether X is linked with Y [...], we trace mechanisms only in cases where they can in theory be present” (Beach and Pedersen 2016b, 14)

<sup>43</sup> Methodology studies identify three main variants of process tracing, namely theory-testing, theory-building, and explaining-outcome. The first two variants are theory-centric, the third variant is case-centric (Beach and Pedersen 2013, 14ff.).

<sup>44</sup> Gerring (2007, 20) argued that: “A case study may be understood as the intensive study of a single case where the purpose of that study is - at least in part - to shed light on a larger class of cases”.

certain trigger and the outcome of interest within a specific case and thus searches for within-case evidence. Any ‘causal mechanism’ refers to a process. Using Elster’s definition, a mechanism corresponds to “nuts and bolts, cogs and wheels – that can be used to explain quite complex social phenomena” (Elster 1989, 3) and thus provides “a continuous and contiguous chain of causal or intentional links between the *explanans* and the *explanandum*” (ibid.; see also Hedström and Ylikoski 2010). A causal mechanism is hence “a theory of a system of interlocking parts that transmits causal forces from X to Y” (Beach and Pedersen 2013, 29; see also Glennan 1996). Before deploying any method, the selection of the case study is key. The research orients itself to the definitions given by George and Bennett (2005). I selected two *explanatory* or “disciplined configurative” (George and Bennett 2005, 75) case studies and used the established assumptions of the P-A theoretical tradition. Both case studies – one in the policy area of border control investigating the development of Frontex, the other concentrating on the asylum policy sector and accordingly on the Support Office – contribute to theory-testing and can “serve heuristic purposes” by adapting the deployed theory further and using it in previously neglected research areas (ibid.).

As any other method, process tracing has been differently interpreted throughout the years, becoming more popular as the influential 1994 book by King, Keohane and Verba (KKV) was being revisited. The qualitative research guidelines by KKV have been a milestone in political science methods readings ever since. However, the suggestions made in this prominent book have also been reconsidered from a more critical angle (e.g. Mahoney 2010). The undeniable relevance of KKV’s contribution lies in drawing attention, in a very systematic way, to descriptive and causal inferences, selection biases, research question formulation, etc. Nonetheless, the authors are strongly drawn towards quantitative analysis – or, as put by Mahoney (2010), they share a statistically oriented approach of social science. According to more contemporary works on process tracing, this approach does not necessarily lead to a better understanding of particular case studies, since the potential of single-case study qualitative research is being overlooked.

The importance of possible generalisations of findings by departing from a single case study to get to “other causally similar cases” through the complementary use of comparative methods has been exemplified by Beach (2017, 2). The author highlighted the relevance of process tracing as a single-case method in his contribution with Reykers (2017), where process tracing is used to analyse the discretion of agents (following the P-A model). Although Reykers and Beach (2017, 257) acknowledge that the focus on a single case can bear some challenges on the evaluation of agencies across cases, they assume that “the strategic deployment of process-tracing nested in a broader comparative case study design” can strengthen the underlying theoretical logic of the P-A model. Leaning towards this claim, I chose the process-tracing methodology as a guidance to collect



empirical evidence on Frontex and EASO to understand *if* and *how* a significant agency empowerment occurred after the Schengen crisis.

In another work on process tracing, Beach (2017, 3) warns the researcher about the tendency of some scholars to view mechanisms as a form of ‘intervening variable’ (e.g. Gerring 2007; King, Keohane, and Verba 1994). This interpretation of the mechanism would require to collect empirical evidence in the form of variation *across* cases and get rid of a within-case analysis, since the variation in the value of the intervening variable can only be assessed by “disaggregating single cases into multiple “cases””. Moreover, the researcher would have to proceed experimentally. As emphasised by Reykers and Beach (2017, 262), the strategy of observing what changes in the value of the outcome of interest if changes in the value of the intervening variable are present (all other things held equal) leads to a mental experiment. It transforms the “within-case tracing of a causal process into a co-variational analysis of patterns of difference-making across sub-cases”.

Hence, process tracing allows drawing a causal narrative by looking at just one case study and focusing on causal-process observations (Collier 2011). Observed phenomena need to be consequently described with great care, paying meticulous attention to each step along the trajectory of hypothesised causation (see e.g. Mahoney 2010). Being descriptive is crucial, since tracing the process entails to take “good snapshots” of specific moments, which allow in turn to identify and describe key variables as well as to construct ideally a “complete and uninterrupted chain of evidence” (George and Bennett 2005, 21; see also Collier 2011). The researcher can use process tracing to draw causal inferences from observed phenomena over time and evaluate explanatory hypotheses, in order to gain insight into causal mechanisms (Collier 2011). Although Gerring (2007) stated that the researcher can never *really* observe the causal mechanisms hypothesised, they are nonetheless useful tools to test what the researcher is trying to guess. A causal inference usually refers to unobservable entities. Scholars should therefore be aware that they infer causality without any direct observation of how this causality truly operates (since no one can rewind time), but this should not withhold them from drawing such inferences and test them. Even though the mechanisms hypothesised are ultimately unobservable, the hypotheses generated by the researcher produce in turn observable outcomes and testable implications (Bennett and Checkel 2015).

Given the chosen within-case analysis, some process-tracing scholars substituted the terms ‘independent/dependent variable’ with the term ‘explanatory factors’. The researcher should assume and take into account variables only when she decides to engage in collecting empirical evidence on variation across-cases, i.e. when she seeks to measure how a change in the value of the independent variable changes the value of the dependent variable (e.g. Beach 2017; Reykers and Beach 2017). Other scholars conversely stated that process tracing is a method by which the research attempts to

identify a causal mechanism between “an independent variable (or variables) and the outcome of interest” (George and Bennett 2005, 206 as in Bennett and Checkel 2015).

This research theorises that either the crisis of the Schengen system determined a *significant* agency empowerment or it did not. Therefore, I refer to the crisis as my trigger (or cause) and to the significant agency empowerment as my outcome and avoid engaging in questions about *outcome* ‘variation’. At the same time, I follow Bennett and Checkel (2015) and use the process-tracing method to see whether the causal process I hypothesise according to P-A theoretical assumptions, is evident in my selected cases, specifically in the sequence of *independent variables*, which correspond to the multiple principals’ and multiple agents’ positions as well as to specific decision rules followed by the principals (see section 3.2).

The abovementioned study by Reykers and Beach (2017) offers useful insights into the possibilities that the process-tracing method provides when using P-A models. The first analytical benefit they mention is that analysing causal mechanisms through the lenses of P-A theory contributes to further advance the theory. “By unpacking mechanisms, we expose the underlying causal logics of the theory to closer logical scrutiny than if they are black-boxed” (ibid., 256). The second mentioned benefit is that by looking at causal mechanisms, P-A researchers can *actually* and explicitly study the causal processes behind specific events instead of considering them hidden in an “analytical black box” (ibid.). The third methodological advantage of using process tracing in combination with P-A is that the researcher is not restricted to the investigation of ‘correlational-type data’, but can include causal inferences about what kind of process the different entities and their activities actually trigger. The goal is to explicitly theorise a mechanism and trace it, in order to demonstrate the causal relationship between X and Y based on empirical research (ibid.). In sum, recognising context-related mechanisms between input and outcome can strengthen the claims made and offer a better understanding of complex realities. The context-sensitivity of the causal mechanism is reiterated by the authors, since the same causal mechanism linking a cause and an outcome might not have any effect if the context changes. Therefore, I paid specific attention to the EU political and policy-related context within which the entities of the hypothesised mechanism act. Reykers and Beach consider the benefits of process tracing in particular with regard to their work on the distinction between the agents’ abuse of discretion and a mere agent adaptive behaviour. The purpose of this dissertation is to investigate both the potential strategies of multiple agents leading to more delegation of power to agencies as well as to explore the distinct roles of multiple principals as explanatory factors of the agencies’ development. Besides drawing a fine-tuned distinction between multiple principals and multiple agents as well as overlaps between the two categories within the EU system, the further contribution this research wants to make lies in

unwrapping the mentioned *context*. The analysis shall provide a better understanding of the EU migration governance and its probable future evolution by explaining the causal “cogs and bolts” behind it (Bennett and Checkel 2015; Elster 1989), in order to know *who* decides *what*.

The dissertation identifies three distinct propositions as presented in detail in Chapter 3. These propositions illustrate the arguments made, by following classic P-A assumptions and applying the process-tracing method in the two selected case studies. Each proposition entails a distinct part of the causal mechanism, which operates according to P-A expectations.

As claimed by some scholars, causal inference may be tested empirically by deploying different criteria and four possible tests (*straw-in-the-wind*, *hoop*, *smoking-gun* and *doubly decisive*) (Van Evera 1997, 31–32). Collier (2011) recommends not to take the distinction between the tests too rigidly, since, despite them being a useful heuristic, they are difficult to apply and it is still up to the researcher’s prior knowledge and formulated hypotheses how to actually test a causal inference. Beach and Pedersen (2013) advocate maximising the levels of both certainty and uniqueness while testing hypotheses. The authors also suggest prioritising certainty over uniqueness in process-tracing test designs. Each part of the tested causal mechanism needs to be strengthened by considering it as “individually necessary” (Beach and Pedersen 2013, 105). Moravcsik (1999) offered an exemplifying application of the method. The liberal intergovernmentalist scholar tests whether supranational actors such as the European Commission can wield political power during EU negotiations (see also Beach and Pedersen 2013). In the two empirical chapters (Chapter 4 and Chapter 5), I assess the hypothesised causal mechanism by examining each part of the causal chain leading from X to Y, drawing plausible links between the two. The method implies that each part of the causal mechanism is alone insufficient to determine the outcome of interest, but all are necessary. The causal configurations that I hypothesise are “sequential and situational combinations” (Blatter and Haverland 2012, 27), in order to reveal the temporal and institutional interplay between these causal conditions and how they lead to the specific outcome, i.e. a significant agency empowerment. Process tracing follows a configurational thinking (Ragin 2008, 109–46; Blatter and Haverland 2012, 80) and the identified “social outcome” is the result of a combination of causal factors. This method should not be understood as a “panacea” for all the hurdles the researcher might face, since the focus on single case studies does not allow to “systematically evaluate agency across cases” (Reykers and Beach 2017, 257). Although the researcher should be aware of the limitations of the method, when combined with a dynamic interpretation of P-A assumptions the latter can contribute strong empirical evidence of the conditions under which significant agency empowerment might occur.

According to traditional process-tracing interpretation, a mechanism should act as “a system of interacting parts that transfers causal forces from causes to outcomes” (Beach and Pedersen 2016a, 3–4). Once the researcher has identified a correlation between X and Y within a specific case study, process tracing should provide guidance to analyse whether there is evidence that an *actual* causal mechanism links X and Y as well. Besides the hypothesised trigger X leading to the outcome Y, “requisite contextual conditions” also need to be present (ibid.). Selecting the right cases to trace the causal mechanism is therefore essential. Nevertheless, scholars deploying the process-tracing method have also tried to offer a more nuanced interpretation of it (Clegg 2014). Clegg reinterpreted and adapted the concept of intervening variables deployed by Krasner (1982), who had conceived international regimes as intervening variables that make a difference within the causal process between power and interest on one side and outcome behaviour on the other. Similarly, Clegg (2014, 738) presented his findings in line with George and Bennett’s (2005) model of analytic explanation and used the term “intervening variables” to refer, for instance, to the wishes of an external agent or the interventions of specific actors, thus presenting a more nuanced conceptualisation of the term. George and Bennett (2005) ascribed great relevance to the scope conditions that the researcher can identify in a case study. According to them, case studies are strong when it comes to the identification of the scope conditions of a theory rather than when generalising specific causal effects. Since Clegg also refers to ‘intervening variables’ as “contextual properties” standing between the cause and the outcome (ibid.), in his study the distinction between *scope conditions* and *independent variables* blurs. Therefore, this study does not refer to intervening variables, but only to (1) the scope conditions of the mechanism, i.e. specific contextual conditions, and (2) independent variables as the actors’ positions and actions that are necessary for the sequential parts of the mechanism to lead from the cause to the outcome. Conversely to this conceptual adaptation, established process-tracing scholars as Beach (2017), who tend towards a strict deployment of the method, conceive the outcome of a causal mechanism only as binary: either there is the outcome of change at the end of the causal process or there is not. Variation in the outcome is unacceptable and the term ‘variable’ is banned from the process-tracing method vocabulary.

The *mechanistic* characterisation of events that are traced in the following should be assessed, according to process-tracing scholars (e.g. Beach 2017), either through an experimental design (for instance a logical counterfactual experiment) or, as mentioned before, by disaggregating single cases into multiple “cases” (see also KKV 1994, 220ff.). The counterfactual experimental route is fraught with challenges, since it entails testing the “nonexistent “possible” alternative” (Beach 2017, 3). KKV invite the researcher to consider observations *over time* and to produce evidence of

the difference that specific factors make. The approach that KKV suggest transforms the within-case analysis into a co-variational analysis across subunits of the original case. According to my interpretation of the method, it would have been reasonable to assume variance only if the values of the outcome (i.e. a significant empowerment) would vary as well, but the inferences made rotate around the fact that either there is the outcome of interest (a significant agency empowerment) or not (no significant agency empowerment). The two selected cases correspond to the two identified migration agencies, namely Frontex and EASO. In both cases, I assume that a significant agency empowerment should be present when the hypothesised trigger of such empowerment, namely the Schengen crisis, is combined with a specific sub-policy context and independent variables. *In theory*, both Frontex's and EASO's development is expected to result in what is defined in detail in Chapter 2 as a significant agency empowerment.

#### **1.4.2 Data Collection**

The chosen method of theory-testing process tracing requires collecting large amounts of data from a wide range of sources (Tansey 2007). Bearing in mind that P-A is not a 'theory' as such, but rather a theoretical model, I apply the process-tracing method to *test* whether and how the Schengen crisis triggered a significant agency empowerment by departing from classic P-A assumptions. Information was gathered by analysing official EU documents (e.g. European Council conclusions, interinstitutional files issued by the presidency of the Council) including documents published by the agencies in question (as for instance general reports, annual activity reports, programmes of work, and management board decisions); public statements (issued by the agencies' respective executive directors or by EU commissioners and the EP's rapporteurs); academic literature and reports by the news agency *Agence Europe*. At first, I had planned to provide further in-depth facts and details in the empirical section by integrating these collected data with a large number of semi-structured qualitative interviews with experts and officials working at or with Frontex and EASO (e.g. staff of the European Commission or of a MS' Ministry). Following Tansey's article (2007), which builds on George and Bennett's work (2005), I hence used interview data as well and did not concentrate on documentary research only. Since there is no clearly defined pool of experts from which a sample might be chosen, I selected interviewees following a non-probability sampling approach: first via the press contact of each agency and in a second step, I expected to do so via so-called 'snow-ball sampling', i.e. recommendations from other interviewees. The attributed expert status was set by the actual field of research, the research question and research goals (Littig 2009, 103) and the goal was to draw a sample that would include the players of the processes and events being studied (Tansey 2007, 765; see also Littig 2009). Whereas the press office of Frontex and

some high-level experts at the European Commission agreed to the requested interviews eventually, there was no response from the Support Office. Despite numerous attempts through different communication and contact channels, EASO withdrew into silence. The respondents' insights working at or in close co-operation with the Support Office would have been an essential benefit to this research, since interviewing remains "an invaluable source of information for qualitative research on the European Union" (Pollack 2003, xii). Another challenge was the impracticability of the snow-ball sampling, since none of the interviewees agreed to forward me to other colleagues. The initial idea to corroborate collected evidence with data gathered from expert interviews did hence not turn out as planned, but I was nevertheless able to conduct five interviews with six high-level experts. Even though they were limited in number,<sup>45</sup> the content of these interviews was extremely helpful to gain a better understanding of the power dynamics within and outside each agency. The six experts that kindly agreed to be interviewed did so on the condition of confidentiality. Therefore, no names, positions or tasks within the respective organisation are mentioned. The place and the modality of the interview (either face-to-face or via telephone/Skype) remains anonymous. In a second step, I numbered the interviewees in order to guarantee their anonymity and accordingly refer to them as interviewee 1,2,3,4 for Frontex and interviewee 1 for EASO, depending on the agency they provided information on.

The next chapter presents the theoretical framework and explains how existing P-A concepts were adapted for the purpose of this study. The third chapter introduces the hypothesised causal mechanism and some background empirical evidence on P-A relations in EU migration governance. Specifically, Chapter 3 outlines the operationalisation of the causal mechanism as well as three formulated propositions. The fourth and fifth chapters constitute the empirical section of this study. Chapter 4 is dedicated to the analysis of Frontex. It starts by tracing the border agency's mandate to then extensively analyse the theorised causal mechanism allegedly leading to a significant agency empowerment. After drawing some interim conclusions, Chapter 5 analyses the mandate of the Support Office and the causal mechanism behind its envisaged reform. Both empirical chapters are constructed around the main propositions presented in Chapter 3. The conclusive sixth chapter summarises the main findings of the study and engages with possible alternative explanations for the two different pathways Frontex and EASO have undergone.

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<sup>45</sup> As mentioned earlier (at the beginning of section 1.4), out of the twenty sent requests only six experts responded and none of them agreed to refer to further colleagues thus hindering the expected 'snow-ball' effect.

## Chapter 2: Theoretical Framework

For the theoretical framework, the dissertation draws on the widespread P-A model, which cannot be defined as a theory *sensu stricto* but rather as a theoretical approach. “Delegation is at the very heart of the European integration process” and the principal agent model represents a useful heuristic to unravel different steps in the transfer and control of authority (Delreux and Adriaensen 2017a, 1; Brandsma and Adriaensen 2017; see also Elgie 2002).

The EU decision- and policy-making involves an ever changing and growing number of stakeholders usually operating in an expanding (horizontal) network (see also Levi-Faur 2011) rather than within a hierarchical structure. Despite academic assessments stating that the agency literature is “biased” towards the P-A perspective (Egeberg and Trondal 2017, 4), this dissertation aims at restoring the model to gain new insights into the EU migration policy and the phenomenon of significant agency empowerment.

In order to do so, first the researcher needs to identify the special P-A relationship amongst numerous other relations. Second, the detected P-A relationship(s) has to be analysed further by observing the pattern leading to delegation and its consequences, namely the distribution of power stemming from the act of delegation (Delreux and Adriaensen 2017b). Scholars warned from the limitations any P-A approach might encounter when applied to the empirics, such as the problem of generalisation. Nevertheless, the model is still useful to discover new conditions to explain the politics of delegation and to refine existing concepts (Adriaensen and Delreux 2017). Against this backdrop, a firm understanding of the decision-making processes in the targeted policy domain is of the essence. Without such understanding, the identification of the P-A relationship(s) of interest fails.

The P-A literature rotates primarily around four central elements. First, transaction costs, which have been a useful notion to analyse the specific relationship between the EU Executive and the legislature (Dehousse 2016). Since policy-making entails significant information costs, lawmakers need above all *technical expertise*, in order to address special issues.<sup>46</sup> Another way to categorise transaction costs is the one presented by Pollack (2006, 168). The author distinguishes between *informational* transaction costs, referring to the costs that the legislators face when they

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<sup>46</sup> There are two kinds of costs that principals incur when delegating, namely contracting costs and uncertainty costs (Hawkins and Jacoby 2006, 203). Contracting costs refer to the time and resources necessary to negotiate the establishment and delegation mandate of the future agent. In the case of EU agencies, contracting costs rise during negotiations between the European Commission, which presents the proposal of the future ‘contract’ and the EU legislative, namely the Council and the EP, in charge to take the final decision. Uncertainty costs are related instead to the uncertainty inherent in any institutional design: the principals can never be sure whether their agents will act according to the established delegation mandate or not (ibid.; see also Keohane 1984; Koremenos et al. 2001).

require technical information; and *credible commitment* costs, which refer to the legislators being aware that committing to specific policies “pays” electorally, but that they cannot “credibly bind themselves or their successors to maintain these policies in the future” (ibid.).

The second relevant aspect of any P-A relation are control mechanisms. Any principal delegating authority to an agent wants to ensure the benefits expected from the delegation. Therefore, the agent’s discretion is limited by *ex ante* control mechanisms usually enshrined in its mandate. Further measures to enhance control can also be established by the principal *ex post*, the aim being that the agent does not deviate from its mandate (Dehousse 2016). Control mechanisms can be established by the principal and are sometimes known in the P-A literature as “police patrol” mechanisms, consisting in active monitoring of the agent’s behaviour by the principal, in order to detect, remedy and discourage possible violations (Pollack 1997, 111). This is the type of mechanism, which the Council usually relies on. Another form of control mechanisms are so-called ‘fire-alarm’ mechanisms (normally started by civil actors), which the EP has often resorted to (see also McCubbins and Schwartz 1984).

The relevance of control mechanisms in any P-A approach suggests the rational-choice assumption underlying it: actors behave as rational egoists, who want to maximise and achieve their interests. This leads to the third relevant aspect of any P-A model, which is the probability of diverging or heterogeneous positions. Any act of delegation comes with a cost. After having been delegated a specific mandate, agents might either develop interests of their own that might eventually differ from those of their principals or an information asymmetry emerges (Delreux and Adriaensen 2017a; see also Coremans and Kerremans 2017). Information asymmetry has been defined “as the surplus of knowledge about the delegated task and related preferences that is available to the agent but not to the principal” (Coremans and Kerremans 2017, 227).

In light of these considerations and as pointed out in studies on power delegation and agency losses in EU trade politics, two possible pathologies might develop from a P-A relationship: first, agency *shirking* and second, agency *slippage* (e.g. da Conceição 2010; see also Elsig 2010). Whereas agency shirking refers to the mentioned problem of conflicting interests between the principal and the agent, agency slippage stems from the delegation structure itself, which encourages the agent to adopt a contrasting position to the one held by the principal (see also Kiewiet and McCubbins 1991). Directly related to the mentioned control mechanisms is the agent’s discretion, corresponding to the range of action and authority available to the agent to fulfil its mandate (see also da Conceicao-Heldt 2013). The principal needs to delicately balance the amount of discretion and control for the agent to effectively comply with its tasks and avoid violations.

Finally, the fourth and last aspect that has been investigated in P-A analyses is the credibility



factor. The credibility factor partly overlaps with Pollack's 'credible commitment' costs. The credibility of policy commitments haunts any politician, who has to take on responsibility in front of the electorate for her decisions. On the contrary, a regulatory agency is protected from such political pressure by being a NMI and thus joining more credibility than politicians. The latter endow agents with power and specific objectives in order to ensure the continuity of policy, which politicians may conversely endanger by being under the influence of electoral concerns (Dehousse 2016). Given that "[e]arlier choices to delegate have also influenced later choices, for delegation is often a process rather than a one-off event", EU multiple agents as NMI can become active actors with increased influence and be no longer only implementing ones (Thatcher and Stone Sweet 2002, 18).

Deploying a P-A approach allows to gain perspectives on relevant actors, their interests and positions, as well as their activities in a particular policy domain. Furthermore, unlike new institutionalists and integration theorists, the P-A approach provides the researcher with a toolkit for the identification of *multiple principals and multiple agents* all tied to one another, but also acting independently from one another. The dissertation seeks not only to explain a significant agency empowerment, but also to uncover its *sources* as well as the *causal mechanism* behind it. There has been no systematic analysis on the dynamics of such an empowerment so far. In order to answer these questions, it is necessary to unravel the institutional knots between the national and the EU supranational level as well as those at the EU level itself. Is a significant agency empowerment the result of MS' national positions and their willpower within the Council? Alternatively, does a significant empowerment of agencies stem from the European Commission's efforts to strengthen the EU Executive further? Has the EP, after its power expansion since the Lisbon Treaty, pushed for more supranationalisation through the creation and consequent reinforcement of new institutional bodies? What about the EU agencies themselves? Do they act strategically, in order to gain more power?

Unlike Williamson's famous statement that agents may serve their own interests rather than those of the principals and are therefore characterised by "self-interest seeking with guile" (Williamson 1985, 30), in this dissertation I do not assume that agents adopted strategies opposing the interest of their contract's counterpart (namely their principals) to advance their own empowerment. Following P-A theoretical claims, I argue first, that principals create agencies so that the latter can act on their behalf and carry out tasks the principals did not want to or could not perform by themselves (e.g. Pollack 2003). Second, I introduce a distinction between primary

principals, i.e. the EU MS, and intermediate principals, that is the EU institutions in charge of delegating authority and exercising control over EU agencies. I further hypothesise that principals strengthen the agents' mandates over time and especially in the aftermath of a crisis, because of the interception of multiple agents. Third, I claim that a significant agency empowerment occurs only when specific scope conditions, i.e. a specific institutional and policy context, is given.

The traditional literature analysing delegation in the EU has usually focused on the relation between MS and EU institutions (vertical dimension) or on the relation between EU institutions themselves (horizontal dimension). Against this backdrop, agencies have always played a minor role, if any, falling under the broader institutional executive system of the EU. Given the literature gap and growing empirical relevance of EU agencies in the migration field, it is not the aim of this project to be 'revolutionary' in a Lakatosian or Kuhnian sense. The goal is to build on existing research and systematically analyse the phenomenon of significant agency empowerment, pushing the P-A model to a new institutional area.

In the past, academia advocated a 'multi-principals model' to acknowledge the absence of a clearly defined principal in the EU system and understand the, at that time, intrinsic weakness of EU agencies, all elements that classic P-A models failed to capture (e.g. Dehousse 2008). Principals and their rationale behind delegation have always been at the centre of EU studies deploying P-A. The polycentricity of the EU executive and its implications for the future of the EU have received relatively less attention, although the number of agents and the distribution of power among them clearly matters when decisions need to be taken. These aspects raise major questions not only on the overall distribution of powers, but also on the division of competences and related future integration challenges within a specific policy area. Integration consists of numerous institutional steps occurring over a longer period of time and often recognised as steps of institutional change towards more integration only in the aftermath.<sup>47</sup> At present, not only would any country exiting the Eurozone and the Schengen area encounter considerable costs, but so would the countries remaining, since the benefits coming with integration would be limited to a smaller geographical and economical area (e.g. Genschel and Jachtenfuchs 2018; Niemann and Speyer 2018).

From this point of view, the notion of 'integration' in the EU context should be understood as a parameter telling us how far MS have gone in delegating their authority to the supranational level. MS are doing so in an effort to co-operate with each other under the aegis of the EU. Integration usually ranges from an intergovernmental to a supranational pole (e.g. Börzel 2005). Against this

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<sup>47</sup> Crises and institutional changes can have major implications for the overall integration process. Since EU integration is a *process*, it cannot be understood as a dichotomous variable. One cannot simply argue that there either is or there is not integration, since integration represents an ongoing and (to some authors) irreversible (path dependent) process (Pierson 1996).

backdrop, depicting the different principals exercising their control over the “galaxy of European regulatory agencies” would also be pivotal to understand the level of integration in a specific policy (Dehousse 2008, 23). The mere fact that EU agencies fall under the control of more than one principal makes it unlikely that these bodies will develop into strong regulators. Nevertheless, scholars also acknowledged that there is more behind the formal delegation of powers as established in the agency’s ‘contract’ – which corresponds to the agency’s founding regulation – and that these new institutional actors seem to exercise increasing influence in their respective policy domain (ibid.). Why and how exactly this is actually the case and why principals agreed to extend the agencies’ mandate despite their reluctance in delegating far-reaching powers to these bodies in sensitive issue areas, remains an unsolved conundrum, which this study addresses.

From a neofunctionalist perspective, adjacent policy sectors, e.g. border control and asylum, should reach at some point in time the same degree of integration due to the so-called spill-over effect (for more details see Pollack 2015). As I have already argued in the introduction, this is not the case in EU migration policy, where border control and asylum policies have undergone different developments. Hence, the goal of this dissertation is to solve this puzzle by identifying and exemplifying the peculiar constellation of principals as well as the multiple character of their agents within the highly contested migration policy sector. The focus is on the increased role of EU agencies and their *de jure* significant empowerment.<sup>48</sup> The analysis does not only take into account the temporal dimension (the history of migration agencies since their establishment), but also the spatial within-policy dimension, that is the sub-policy the agency acts in (border control or asylum), in order to draw a comparison between the two agencies over time.

Hypotheses derived from the P-A approach allow to draw causal inferences explaining the linkage between X and Y, the *explanandum* being the significant empowerment of EU agencies through the replacement of the old establishing regulation with a new one. Inspired by the referred studies, the definitions of ‘principals’ and ‘agents’ are here tailored to the dissertation’s specific research design and question. The next section outlines an alternative conceptualisation of these notions.

## **2.1 An Alternative Conceptualisation of Principals and Agents**

This dissertation aims at loosening the dyadic P-A relationship, demonstrating that there can be overlaps between the two categories of ‘principal’ and ‘agent’ and that MS are no longer the only principals deciding upon the fate of or exercising their control over supranational agents. In the EU,

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<sup>48</sup> A significant empowerment is always a *de jure* significant empowerment, since it occurs through the adoption of a new regulation (for an additional distinction between *de jure* and *de facto capabilities* see Heldt and Schmidtke 2017).

the technical expertise came initially from the European Commission only, which is in charge of acting on behalf of its principals, namely the Council and the EP as identified in most of the delegation literature (e.g. da Conceição-Heldt 2017). There have been relatively few studies investigating the role of the EU Executive as the agent of multiple principals and how its role matters in EU politics (e.g. Pollack 2003). The P-A model lends itself to disentangle the complex relations between the Commission, the EU legislative institutions and MS as well as EU agencies.

Against the intergovernmental belief that EU agencies remain within the remit of national governments (Egeberg, Trondal, and Vestlund 2015, 610), I counter-argue that supranational agents as the Commission affect greatly the development of these institutional bodies. The growing roles of the Commission and of EU agencies call for a new interpretation of the standard ‘principal’ and ‘agent’ definitions.

The EU has been defined as a ‘multi-level’ system of numerous actors operating together within an intricate institutional web (e.g. Pollack 2006). This characteristic leads to *sui generis* institutional arrangements such as the EU Commissioners being nominated by the member governments, who are also represented in the Council and thus remain the “masters” of the Treaties (ibid., 192). At the same time, the nomination of the Commissioners has to be approved by the EP. According to most P-A scholars (e.g. da Conceição-Heldt 2017), this entails that the Commission is the agent of multiple principals – namely the MS (collectively represented in the Council) and the EP. Others have long struggled with this last statement, asking whether the EP has at all emerged as one of the Commission’s (co-)principals and if so whether it is one of multiple principals or part of a collective one (e.g. Pollack 2006, 107 ff.).<sup>49</sup> As stated above, the multiplicity of principals is not the only challenge in the EU system, because the Commission does not stand for the only institutional executive body anymore. New institutional actors have come to the fore: specialised agencies with their own expertise, strategies, and ability to make predictions. Scholars have argued that risk assessment capability and the prerogative in identifying common threats – both relevant dimensions of the work carried out by migration agencies – have a decisive impact on the development of the AFSJ and political decisions (Monar 2015b).

The expertise and experience gained through continuous activity are the agencies’ most powerful tools, since they allow them to assess risks and, based on that, become relevant actors in the principals’ perception. The status gained by an agent from the principals’ perspective may

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<sup>49</sup> In 2006, Pollack stressed that, despite the EP exercising significant powers over the Commission (such as its supervisory powers or its power of assent over the nomination of the European Commissioners), the EP seems not to be a ‘principal’ in a strict sense as in the definition given by Lyne et al. (2006). It is therefore disputable, according to Pollack, to state that the Commission is under the control of *multiple* principals, since the EP acts more as part of the Commission’s *collective* principal rather than being a principal on its own (Pollack 2006, 192–93).

derive from past actions and expertise and also “from historical processes, where some actors gain a first-mover advantage by [...] accumulating expertise and organizational resources that are recognized as relevant in the field at a specific point in time” (ibid., 150). Accordingly, Vetterlein and Moschella (2013, 150ff.) analyse “the status granted to an organization in solving a collective problem at a specific point in time” based on the ‘capital’ it holds.<sup>50</sup> Hence the agent’s status depends on the perception that other actors surrounding that institutional body have of it. Leaning towards these claims, I explore the status of the agency in question within its specific policy realm as well as the official positions of the principals involved in the delegation process. The position of each involved principal, the demands and opinions it advances as well as its acts are essential to understand the decision-making behind delegation.

With regard to the sensitive EU migration policy, the dissertation first and foremost aspires at understanding the complex delegation chains and tracing which powers have been delegated to each institutional body. It is challenging to differentiate clearly the functions of each body within the EU compound machinery, even more when the policy sector of interest is one that MS do not want to lose their grip on. Ever since the establishment of the Schengen area, integrating the migration sector has become an unavoidable and necessary process, but how far has the integration process gone? And how do EU agencies fit into the picture?

Three reasons guided the selection of the P-A approach to address the dissertation’s overarching research question. First, existing integration theories, which have been usually deployed to investigate EU policy-making, seem to have overlooked the nuances that explain the dynamic process leading to stronger EU agencies in the migration sector. Second, delegation and the subsequent division of tasks can be better understood by deploying an exemplifying, descriptive model rather than a generalising theory with a prescriptive character. The question here is not what ought to be, but what is and why, in order to understand the present situation and possible future of EU border control and asylum institutions. Third, adapting the P-A model to contemporary matters – as has also been done by other authors exploring the macro-level of the EU institutional landscape (e.g. Delreux and Adriaensen 2017b) – might not only lead to new insights into specific political patterns, but also into the approach itself, thus widening its scope and assumptions.

Differently from previous studies, this analysis draws on tailored classic P-A assumptions to illuminate the complex EU multi-level structure and to call attention to the activity of agencies in

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<sup>50</sup> Inspired by DiMaggio and Powell (1983), Vetterlein and Moschella (2013) actually refer to the ‘position’ of an agent (the agent in their study specifically corresponds to the IMF), to describe that agent’s status. In order to avoid confusion with the concept of multiple principals’ and multiple agents’ *positions* as deployed in this study, I distinguish between the ‘status’ of the agency, i.e. how the agency is perceived by its principals based on its experience and activity, and the ‘position’ held by each principal and agent, i.e. its stand on a certain issue.

the migration sector. In the past, scholars produced greatly on the *why* and *how* of delegation. Today, the dissertation tests the explanatory potential of this classic approach by applying it to the specific case of EU agencies. It challenges both the somewhat rigid definitions of principals as actors that “must both grant and have the power to revoke authority” (Hawkins et al. 2006, 7) and of agents as a unitary executive. While acknowledging the importance of existing interpretations, this research argues that EU agencies should be considered policy players in their own right and not an acquiescent extension of the European Commission. Although the P-A perspective might seem at first sight ill-suited to explain the complex web of relations in the EU, because of its hierarchical, dyadic assumptions, it still satisfies the purpose of disentangling these complexities. Moreover, studies using P-A explanations to understand the EU context have shown the possible relevance of “reversed delegation”, a concept indicating that despite the Council and the EP (as supranational principals) being the ultimate decision-makers at the supranational level, they normally can only act on a proposal made by their agent, i.e. the Commission (see Brandsma and Adriaensen 2017). The notion of *reversed delegation*<sup>51</sup> therefore entails a circular dynamic, where principals and agents are mutually dependent from one another in their specific relation and where the mentioned dyadic perspective encounters its limits. An additional elaboration on this notion might dismantle the classic, unidirectional P-A dyad and subsequently introduce innovative perspectives on the EU policies and its actors.

Whereas the cause and the outcome of a P-A relation have been extensively explored, relatively less attention has been given to the actual causal mechanisms *linking* the two (e.g. Reykers and Beach 2017). Any act of delegation sets the terms for the agent’s *discretion*, a concept widely deployed in the P-A literature, but not the subject as such of this dissertation. Nevertheless, it is relevant to refer to what Pollack (2017, ix) relatedly highlighted as the “ongoing *politics of discretion*” in the EU and the importance he attributed to “the conditions under which, and the ways in which, supranational agents are able to carve out a zone of discretion vis-à-vis their principals”. Although academics have introduced a novel interpretation of the P-A model by acknowledging that the interaction between *multiple* agents shapes their discretion and that the external institutional environment within which the P-A relationship unfolds is key, they keep assuming a two-dimensional version of the model with principals on one side and agents on the other (Delreux and Adriaensen 2017b).

This dissertation contributes to the current debate on the relevance of P-A analysis in the contemporary EU system by exploring the concept of ‘empowerment’ with regard to EU agencies

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<sup>51</sup> Brandsma and Adriaensen (2017, 48) use for their idea of reversed delegation also notions such as ‘agent-in-between’, in order to sketch very briefly the “messy picture” of how P-A relations can develop within the EU. Nevertheless, they do not elaborate further on this specific remark.

and by introducing a new interpretation of multiple principals and multiple agents. These two roles are not always distinct, as scholars have theorised thus far, but tend to blur and overlap in some specific contexts. In this study, I therefore distinguish between *primary* principals, *intermediate* principals and *multiple agents*. These distinctions do not entail that the institutional players involved in a specific EU policy belong to either one or the other category, but that they can play more than one of these roles. *Primary* principals are those actors whose former powers have been delegated to the supranational level. They are the first set of principals within a complex delegation chain. *Intermediate* principals are those actors participating in and enforcing the act of delegation. Intermediate principals distinguish themselves from primary principals, because of the simultaneous overlapping role they play as supranational *agents* of the (national) primary principals.

## **2.2 Principal-Agent Relations and Empowerment**

Delegation of authority, probable divergent positions, and the need for expertise are all central aspects of a P-A relation. The P-A model has been already deployed for the conceptualisation and measurement of *IO empowerment* (Heldt and Schmidtke 2017). Leaning towards this concept, after investigating the changes in the agencies' issue scope, tasks, and capabilities over time as conceptualised so far (Heldt and Schmidtke 2017; see also Börzel 2005; Hooghe and Marks 2015), I aim at providing a new deployment of the empowerment notion with regard to EU agencies. Whereas a steady, but not outstanding empowerment of the migration agencies under focus seems to have taken place since their establishment, mainly through an increase of their activities and capabilities, it is only after the outbreak of the migration crisis of 2015-16 that an actual and potential *significant* empowerment of these institutional bodies can be observed. Only after the Schengen crisis, the Council and the EP adopted upon a proposal of the European Commission a regulation that would significantly transform Frontex into a new unprecedented structure, the EBCG. At the same time, the European Commission proposed to transform the Support Office into a new fully-fledged agency for asylum, the EUAA.

The abovementioned specific characteristics of the agent's mandate, namely issue scope, tasks and capabilities, are closely linked to the expert-knowledge the agent has to provide and the experience it has gained over time. As emphasised by Hawkins and Jacoby in quoting Williamson, the established formulation that agents are "self-interest seeking with guile" has rarely been questioned (Hawkins and Jacoby 2006). Although principals exercise control over their agents, the latter can still develop own interests, which challenge those of their principals, as well as strategies to follow such interests. Principals therefore resort to certain control mechanisms to curb the

agency's autonomous behaviour (e.g. Grigorescu 2010; Johnson 2013). P-A studies have thus usually championed the assumption that agents do develop their own interests and that they are likely to strategically seek more discretion behind the principal's back (e.g. Nielson and Tierney 2003). Following these claims, the agent's 'empowerment' would find its explanation either in loose control mechanisms by the principals or in agency *slack* – i.e. independent action undertaken by the agent, which is contrary to the intentions of its principals (Heldt 2017). Conversely, in this study I pose a somewhat different question about whether it is rather a certain policy and time context as well as the actions of *multiple* agents that trigger the significant empowerment of agencies, without the latter actively pursuing their own interests against those of their principals.

In order to develop my hypotheses, I analysed in detail how the P-A model and the notion of 'empowerment' link to each other. In the next section, I present the operationalisation of 'significant agency empowerment' inspired by the notion of IO 'empowerment' and the literature on 'power'. In the upcoming Chapter 3, I then outline the three propositions I drew by applying the theoretical P-A model to the selected research topic.

### **2.3 Operationalisation of 'Significant' Agency Empowerment**

The dissertation adapts the notion of empowerment to agencies in EU migration policy and aspires to explain 'significant' agency empowerment in this area. From a theoretical perspective, agency empowerment is understood as a phenomenon that unfolds over time and that reaches a higher degree (in terms of more delegation of power) the longer the agency has been in place. By a significant agency empowerment in the EU, I refer to a single event during which the adoption of a new regulation replacing the one that established the agency in the first place, officially as well as significantly expands the mandate of the agency. Given the conceptual grounds on which the notion of empowerment builds on, it is unavoidable to consider the notion of *power* before outlining in detail the different components that are assumed to allow the researcher to observe the agency's empowerment over time.

'Power' is a concept that scholars of political science have often deployed, despite its controversial and highly disputed definition. The concept of power has been mainly used when referring to states and IOs (e.g. Baldwin 2013; Barnett and Duvall 2005; Barnett and Finnemore 1999; 2004; Heldt and Schmidtke 2017; Keohane and Nye 1987), but it has been only scarcely deployed when researching agencies. Nye's book on the distinction between *hard* (coercion) and *soft* (co-opt) power has been a milestone in the literature on power (Nye 2004). When defining *soft power*, the author describes it as the ability of an actor to shape the 'preferences' of others.

Barnett and Finnemore (2004) provide a more comprehensive overview on the rise of IOs in



world politics and their consequential growing influence. The authors define ‘IO power’ as the “production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate” (ibid., 29). They consequently identify the notion of IOs’ power with material resources, authority and, most importantly, expertise. Paraphrasing Barnett and Finnemore (2004), expertise affects the authority of the agent, who is rationally conferred such authority because of the advanced know-how it can offer in highly specialised technical areas. Moreover, expertise determines how agents behave, since any agent has to serve that specialised knowledge it brings and needs to act accordingly. Finally, the agent’s expertise creates the “appearance of depoliticization” (ibid., p. 24), i.e. it gives the impression of its knowledge being ‘objective’ and therefore unaffected by political interests (Meissner 2017, 6).

In view of these considerations, the significant empowerment of agencies in the EU migration policy might be understood as a consequence of the increasing principals’ need over the years for expertise, information as well as supranational operational co-operation. Relatedly, Hooghe and Marks (2015) operationalised the concept of authority with regard to IOs and conceived this notion as inherent to two dimensions, namely the act of delegating authority from MS *to* a supranational body and the act of pooling MS’ authority *within* a supranational body. Following this line of argument, delegation of authority to external bodies, as for instance EU agencies, differs from the pooling of authority among MS, i.e. the “principals” themselves (ibid., 307), within specific fora as for instance the Council or the agencies’ management boards. The concept of significant agency empowerment theorised in this study involves exclusively the dimension of authority *delegation*.

In the understanding of Heldt and Schmidtke (2017), empowerment is conceived as the continuous expansion of the agent’s tasks, issue scope as well as a reinforcement of its capacities over time within its establishing mandate. Conversely, *significant* empowerment is a one-time event that takes place when principals officially adopt a new regulation that ‘significantly’ expands the mandate and thus strengthens the agency’s former role through the creation of an entirely *new* structure. This reinforcement and expansion are achieved through further delegation of power and through the establishment of a different institutional body replacing the old one. The analysis of the agencies’ development aims at showing how multiple agents (including the European Commission) interact with their principals and hence how the delegation of more power to the agent ‘competes’ with the pooling of authority among the principals.<sup>52</sup>

The notions of *authority*, *power* and *influence* often blur into one another, creating notable hurdles

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<sup>52</sup> Some scholars have also observed how the transfer of political authority to EU institutions results “in a loss or at least severe constraints on national sovereignty”. This limitation of national sovereignty has fuelled in times of crisis Eurosceptic populist forces, which have increasingly engaged in a fight against the political *status quo* (Börzel 2016, 9).

when it comes to the definition of each concept. Some studies also seem to suggest that one is the precondition for the other, as in the article issued by da Conceição and Meunier (2014) presenting the close link between power (in terms of bargaining power) and influence (in terms of effectiveness as the ability to impact an outcome). The authors analyse the ability of the EU to achieve external effectiveness when wielding its normative and bargaining *power* in a cohesive way. Power is often understood as the ability to impact the preferences of other actors and the decision-making process, whereas authority is described as a communication quality through which manipulation of information and ideas can be achieved (see Wood 2017).

The article by Hooghe and Marks (2015) claims that once IOs have been delegated powers by their MS, such authority is a function of two factors: the policy scope of the IO and the scale of its membership. Specifically, the authors argue that the larger the membership and the broader the policy scope of an IO, the more MS are willing to delegate authority to the supranational level. As a corollary to this statement, if the IO's policy scope is broad, MS are less willing to *pool* authority in majoritarian decision-making. Whereas delegation refers to what Hawkins et al. (2006) already defined as the “conditional grant of authority by member states to an independent body”, pooling is the joint decision-making among the principals themselves (Hooghe and Marks 2015, 307). The peculiar structure and mandate of EU agencies determine that their ‘authority’ is the unusual result of both dimensions, i.e. delegation and pooling. Migration agencies are bodies that have been delegated authority, but the shared character of the sub-policies they are acting in still envisages joint decision-making among their principals. Again, the existing literature on delegation to IOs deploys rigid definitions that are rather unsuited for the analysis of agencies in the EU. Hooghe and Marks’ contribution is however particularly relevant for the policy scope component within the definition of empowerment. Specifically, the authors argue that a large policy scope encompassing multiple policy issues is more likely to determine a lower degree of authority for the IO in question because of the higher interface with domestic policies. Conversely, EU agencies have a mandate in very specific and circumscribed policy areas and are thus more likely, following Hooghe and Marks’ line of argument, to be delegated additional authority – or rather power, as in the understanding of Heldt and Schmidtke’s (2017) definition.

Against this conceptual background, this study deploys the definition of empowerment given by Heldt and Schmidtke (2017) by taking further into consideration the concept of ‘authority’<sup>53</sup> as developed by Hooghe and Marks (2015). According to IR studies, in order to exercise their

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<sup>53</sup> Whereas Hooghe and Marks offer an operationalisation of the *de jure* authority delegated to IOs, Barnett and Finnemore’s work (1999, 707) describes rather the *de facto* authority of IOs. In the latter work, authority is the inevitable result of power flowing from the principal to the agent from two main sources: the “legitimacy of the rational-legal authority” that the agent embodies and its control over expertise and information.

authority (or power) and hence shape global governance, IOs have to resort to their financial and staff capabilities, since resources matter greatly when it comes to the fulfilment of delegated tasks by the agent (e.g. Brown 2010; Heldt and Schmidtke 2017).

Leaning toward the mentioned definition of empowerment, I regard *power* as the result of three components: tasks, issue scope, and capabilities in terms of staff and finances (Heldt and Schmidtke 2017, 2). Empowerment is the “delegation of power to IOs as a process evolving over time” (ibid.), which shapes the three abovementioned components of power. This definition of power includes the relevance of both temporality and resources, i.e. financial and staff capabilities. The act of delegation, through which power is transferred, is one of the two dimensions in which Hooghe and Marks (2015) theorise authority to be latent. The other dimension is, as mentioned above, pooling and the authors describe these two dimensions as independent from one another. The pooling of authority should facilitate decision-making, but it also carries the danger for MS to be outvoted on issues of major interest. Therefore, the MS’ conflict over Qualified Majority Voting (QMV)<sup>54</sup> in the EU reveals an underlying “fear of domestic damage” that can make MS resistant to pooling (Hooghe and Marks 2015, 311–12). Complementary to Hawkins et al. (2006), who argue that majoritarian decision rules can better aggregate the preferences (or rather, according to the terminology deployed in this study, the *positions*) of the principals and concentrate authority, Hooghe and Marks (2015) similarly assume that majority decision-making procedures are more likely to push EU governments to pool authority. EU governments are likely to do so if the decision at stake might exacerbate conflict at the domestic level. The authors agree that the larger the membership of an IO (which in their mentioned example is the EU), the more likely majoritarian decision rules will be put in place and institutionalised.

Hence, the mentioned *empowerment* definition lends itself to be integrated with Hooghe and Marks’ (2015) definition for both its focus on the agent’s authority in terms of delegation and pooling as well as for the relevance it bestows on the agent’s issue scope (or policy scope). A further pivotal component to trace the agent’s empowerment are its *capabilities* (both financial and personal). The identified link between budgetary means and IO governance can be traced also in the context of EU agencies (e.g. Graham 2014). The more financial and staff capabilities agencies can draw from, the more they can engage in their political environment.

In line with the empowerment definition given by Heldt and Schmidtke (2017) within the

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<sup>54</sup> The QMV procedure was introduced in 2014 and is also referred to as the ‘double majority’ rule. According to this procedure, when the Council votes on a proposal presented by the Commission or the EU’s High Representative for Foreign Affairs and Security Policy, a qualified majority is reached if 55% of EU countries vote in favour and if the proposal is supported by countries representing at least 65% of the total EU population (for more details see *EUR-Lex* on ‘Qualified Majority’ available online under [https://eur-lex.europa.eu/summary/glossary/qualified\\_majority.html](https://eur-lex.europa.eu/summary/glossary/qualified_majority.html) (last accessed on 7.4.2019)).

abovementioned DELPOWIO project (see introductory chapter), I concentrate on the EU agencies' development over time in terms of the body's tasks, issue scope and capabilities as well as on the status they have accordingly gained given their expanding activity. The length of time that the agency has been in place allows it to strengthen its skills, if it is provided with the necessary resources. The longer the migration agency exercises its activity, the more MS have shared their national competences with an independent institutional body and relied on the agency's unique know-how. Analysing the agency's development, which I trace from the agency's establishment until mid-2018, should offer an in-depth understanding of how an expanding issue scope as well as increasing resources and tasks (which are interpreted as 'empowerment' in the sense of Heldt and Schmidtke (2017)) run parallel with a growing experience over time on which MS increasingly rely on. As a result, the importance of supranational operational co-operation in the migration sphere grows (Trauner and Ripoll Servent 2015b).

Ultimately, if a crisis breaks out, in the uncertainty of the moment MS' positions are likely to diverge on 'core power' issues allowing multiple agents to consequently push for and thus allegedly leading to a significant agency empowerment. The further necessary, but not alone sufficient condition for the crisis to trigger a mechanism leading to significant agency empowerment are the specific scope conditions of the mechanism, which correspond to the sub-policy the agency acts in and the specificities of the EU system. Since the abolition of internal borders and the entry into force of the Schengen agreement, MS would no longer be able to tackle border control and asylum issues alone without co-operating with the other EU MS following common rules. Hence, the supranationalisation of the EU migration policy and specifically of the border control and asylum sub-policies has increased interdependencies not only between the MS themselves, but also between MS and EU agencies, which are in charge of enhancing co-operation in their respective field.

Conversely to some scholars arguing that MS decided against "empowering" the EU supranational institutions in the domains of foreign and security policies (e.g. Wolff, Wichmann, and Mounier 2009), the dissertation hypothesises that a significant agency empowerment has occurred as an outcome of a specific crisis (the *trigger* or *cause*) as well as of additional specific determinants. These determinants (or independent variables) correspond to the primary principals positions as well as the intermediate principals and multiple agents actions, which are taken following particular decision rules and given specific scope conditions (more details follow in the upcoming Chapter 3).

So far, the concept of empowerment has been used for IOs only. Heldt and Schmidtke draw from a wide IO literature ranging from realist (e.g. Waltz 1979) to neoliberal institutionalist

approaches to develop their concept (e.g. Nye 2004). They then resort to the P-A model, in order to investigate the specific delegation processes between states and IOs and illustrate their concept. The authors argue that empowerment occurs when new tasks are delegated to IOs, when these tasks are extended to new issue areas, and when staff and/or financial capabilities are expanded (Heldt and Schmidtke 2017, 4). The contribution of this dissertation is to deploy Heldt and Schmidtke's concept to EU regulatory agencies and to explore how a *significant agency empowerment* occurs. I thus aim at crystalizing the different positions and strategies of principals and agents in a complex policy environment. By doing so, the analysis intentionally leaves out the domestic preference formation of the single EU MS and concentrates on the official positions held by the agencies' principals.

By tracing P-A relations in the EU migration policy, the dissertation does not only shed light on an under-researched area within the existing literature, but aims at further adjusting the dyadic P-A model to the EU. Most of the existing P-A literature presents a static interpretation of the model – with very few exceptions trying to introduce some dynamic elements (e.g. Andonova 2017; Büthe 2010). The complex and multi-layered EU system calls for a non-static application of the P-A model. Avoiding conceptual complacency and being rigorous in the deployment of specific concepts is of the utmost importance (see Delreux and Adriaensen 2017b). However, progress in research is primarily achieved by evolving existing knowledge in the light of new findings. The ultimate purpose of this dissertation is consequently not a “*conceptual stretching*” (Sartori 1970, 1034), but rather a narrowing of the notion under focus. Instead of covering more with less, the aspiration is to define existing terms more precisely, in order to address the chosen research question and to explain ever-changing phenomena.

In view of the examined research, I define a significant agency empowerment in the EU as the process of significantly growing tasks and capabilities (financial and personal) of an agency along with a widening of its issue scope and tasks through the adoption of a new regulation. I therefore expect that a significant empowerment of the agency in question would occur through an increased delegation of power to the agency. I further assume that the expertise of the agency is closely linked to its capabilities, since increased financial resources allow it to employ more staff and hence more experts (see also the concept of “expert agencies” by Majone 1997). As a result, four components allow to identify a significant agency empowerment: a *de jure* growth in tasks, issue scope, and capabilities through the creation of a *new* institutional structure.

Contemporary findings have shown that EU agencies have become increasingly relevant. Nonetheless, they are often erroneously considered as exclusively technical and operational bodies

(e.g. Scipioni 2017a). By observing how both the *de jure* competences and the *de facto* activities of Frontex and EASO have expanded since their establishment, the dissertation shows how their activity actually goes beyond mere administrative and executive tasks, touching the initial phases of EU policy-making (see also Wood 2017). When engaging in such an analysis, *empowerment* and *power* shall not be confused since they are two distinct notions. It is not suggested that the agency's empowerment automatically translates in the classic wielding of power, but that it rather has an impact on the decision- and policy-making process as well as on the agency's role.

For the concept of authority, I took further into account Lake's (2010) advice that the researcher should abandon the legal-formal conception of it. Lake's study is embedded in the IR literature and analyses authority in a global governance setting, which is different from the specific EU system that I zoom in on. Nevertheless, the idea suggested by the author that the delegation of authority from MS to other supranational bodies automatically also *limits* their power and thus conditions future behaviour, proves key for the analysis of migration agencies. This idea has not been extensively developed by P-A scholars, who rather concentrated on the instruments put in place by MS to keep their primacy and control over other supranational actors. The fact that MS delegate authority but simultaneously try to withhold it could be interpreted as a 'schizophrenic' behaviour. Lake (2010, 589ff.) therefore interprets authority as a *relational* notion. It is a social contract in which a governor (or principal) provides a political order of value to a community in exchange for compliance by the governed with the rules necessary to produce that order. By exploring in particular the concept of global governance, the author understands it as the set of actors that wield authority across national borders including "international organizations that possess authority over their member states". Accordingly, authority is no longer a statist concept, i.e. appertaining to the state only. When looking at this definition in the light of my specific analysis, the establishment of a political order coincides with the establishment of a new institutional agency to which authority has been delegated, in order to provide that specific political order (for instance, the development of an integrated border management system). The agency's authority is thus not only legitimated by an official act of delegation, but also through the exceptional expertise, which this body can dispose of, and the unique support it can offer. By combining these reflections with the analysis on authority by Hooghe and Marks (2015), I consider the notion of authority as implicit in the overall concept of empowerment, since authority emerges both from the act of delegation as well as from the subsequent activity of the agency as a supranational body impacting and regulating MS' behaviour.

The theoretical tools that lie in the tradition of P-A play a major role when analysing the causal mechanism as hypothesised in the next Chapter. Paraphrasing Fioretos et al. (2016) and taking into

account the central point made by Busuioc et al. (2012), although agencies may not alone determine the evolution of the EU political order, closer scrutiny to what these bodies empirically do enhances a better understanding of the processes that shape the evolution of a common EU policy.

Academics have referred to the “newly *empowered* supranational institutions” (Trauner and Ripoll Servent 2016, 1429 [emphasis added]) in the AFSJ, but elaborated very little on this notion, claiming that although EU supranational institutions (i.e. the Council, the EP, the Commission and the ECJ) have been granted more competences, they have not been able to determine change within this broad policy sector. However, scholars have also argued the opposite, claiming that EU institutions did and still do matter in the development of the AFSJ (Monar 2015b; see also Héritier 2007). These contrasting claims are evidence of the increasing need in contemporary research to shed light on the evolution of institutional bodies at the EU level and the consequences of such development on the overall policy-making in the realm of migration. The further problem with existing analyses is that they underestimate the relevance of other actors, to whom in turn the EU supranational institutions delegate competences. In order to close such a gap, this study contributes to the existing literature by tracing the activities of multiple principals and multiple agents in the border control and asylum sub-policies after the Schengen crisis, in order to understand the significant empowerment of EU migration agencies.

The cumulative knowledge gained by P-A scholars with regard to the EU system is wide. Although the P-A model has been widely used to explain the quantitative and qualitative expansion of the EU regulatory power, a gap still exists in systematically analysing this phenomenon as well as the division of competences between numerous principals and agents at the EU level with regard to EU migration policy (more details on the division of competences in the EU migration policy follow in Chapter 3). It is not the purpose of this dissertation to discuss the merit of existing P-A research nor to ‘revolutionise’ the model, but rather to refine certain concepts and offer a progressed framework that allows understanding contemporary developments in the EU. In order to achieve these goals, the dissertation offers a systematic analysis of different delegation relations, which I unravel by considering each of the involved actors separately. To identify different P-A relations clear definitions of both ‘delegation’ and ‘principal’ are essential.

According to Hawkins et al. (2006), delegation is a conditional grant of authority from a principal to an agent “that *empowers* the latter to act on behalf of the former” (Hawkins et al. 2006, 7 [emphasis added]). The grant of authority is limited in time and scope and governed by a *contract*. The contract is therefore the embodiment of the vertical relation between the principal and her or his agent and the principal must be able to both grant authority and revoke it, otherwise she or he

cannot be defined as such (ibid.). The contract establishes the degree of discretion granted to the agent and specifies the principal's goals that the agent has to achieve. Discretion corresponds to the "sum of delegated powers" granted by the principal to the agent, minus the sum of control mechanisms available for use by the principal (Thatcher and Stone Sweet 2002, 5). This sum of delegated powers is transferred by the principal to the agent through the mentioned contract. Following Hawkins et al. (2006), the contract between the principal and the agent further specifies the scope of the delegation, the agent's instruments as well as the procedures to follow, in order to carry out the foreseen tasks (see also McCubbins and Page 1987, 412). Such a contract is not necessarily formal and legalised but can also be informal and implicit (see Hawkins et al. 2006; Niemann and Huigens 2011). Be it formal or informal, what really matters is that the act of delegation needs to exist, in order to identify a P-A relation.

Relatedly, according to Heldt and Schmidtke (2017) there are also two forms of empowerment: formal and informal. Formal empowerment refers to explicit, formal changes to the founding mandate of the agency and other legal documents regulating the tasks to be performed by the agency and the resources available to it. Informal empowerment occurs when new tasks are added to an agency's portfolio, when the issue area in which the agency's tasks are performed are extended, and when the staff and financial capabilities increase without changing the formal delegation contract. This categorisation between formal and informal is a good starting point to understand changes in the EU agencies' mandate, but it needs to be further refined for the purpose of this research. In the case of Frontex, for instance, in 2011 some amendments were officially, and thus formally, adopted to the agency's establishing regulation. According to the mentioned conceptualisation of empowerment, these changes would fall under the category of formal empowerment. The 2016 reform of Frontex was also an official act of delegation and hence of formal empowerment, but not comparable to the amendments of 2011 in importance and extent. Therefore, instead of drawing the line between formal and informal empowerment, I introduce the notion of a 'significant' empowerment. Significant empowerment describes a formal, official reform of the agency that takes place not simply by amending the establishing regulation, but by adopting a new one, extending the agency's mandate substantially in all three components (tasks, issue scope and capabilities) and creating a new structure.

When analysing delegation, classic P-A studies observed and weighed the agent's discretion, autonomy, and independence. Some scholars have warned from the confused discussion that might rise when using these terms as synonymous (Busuioc 2009). For instance, the independence of an agent should be understood as the result of two dimensions: on one side, the institutional separation



of the agent from its creating body; on the other side, the *autonomisation* of the agent, which entails a certain degree of discretion (ibid., 8). Whereas discretion is by design a product of the principal's decision, *autonomy* is "an unavoidable by-product of imperfect control over agents" (Hawkins et al. 2006, 8). Agents can independently develop their own interests, which might not reflect those of their principals. This can determine increasing agency losses, i.e. costs that the principal has to face when agents engage in undesired action, for instance when information asymmetries arise (ibid.; Pollack 2003, 26). Since the principal's goal is to grant as much discretion to the agent as to obtain the expected benefits that should stem from delegation, precautionary measures have to be taken. *Ex ante* and eventually *ex post* control mechanisms are therefore essential for the principal to avoid such losses. Nevertheless, principals need also to be aware that "the benefits of delegation decline the more the principal limits the agent's discretion" (Thatcher and Stone Sweet 2002, 4–5), for instance by exercising more control over the agent. Therefore, the principal aims at delegating only the amount of discretion necessary to enable the agent to achieve its goals and at monitoring its activity through specific control mechanisms.

Although classic P-A studies refer to the agent's discretion, I follow contemporary studies investigating the agent's delegated powers (e.g. Brandsma and Adriaensen 2017). In this regard, scholars advanced the argument that agent's discretion or rather its *delegated power* is not only a function of the principal's interests and control mechanisms, but also of the agent's own action (da Conceição-Heldt 2017). This argument echoes the concept of 'reversed delegation' (mentioned in section 2.1), according to which the authority delegated to the agent 'backfires' and the agent herself or himself gets in charge of determining her or his own authority. For these reasons, da Conceição-Heldt (2017) shows the limitations of traditional P-A studies focusing on the formal act of delegation without taking into account the control mechanisms in place.<sup>55</sup>

Against this background, Curtin (2005) was one of the first scholars to tailor the concept of delegation to the peculiar case of NMIs. Specifically, she adapted the definition given by Stone Sweet and Thatcher (2002) and stated the following: "[delegation is] an authoritative decision, formalised as a matter of public law, that (a) transfers policy making authority away from the established, representative organs [...] to (b) a public non-majoritarian institution" (Curtin 2005, 90).<sup>56</sup>

After having defined delegation and its implications, the specificities of the EU reveal some

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<sup>55</sup> Da Conceição-Heldt (2013) advanced this argument with regard to the role of the Commission during EU trade negotiations, where the Commission can take decisions on its negotiation mandate in advance and hence decide on its *own* delegated authority.

<sup>56</sup> Thatcher and Stone Sweet define NMIs "as those governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials" (Thatcher and Stone Sweet 2002, 2–3).

hurdles when engaging in the identification of P-A relations with regard to EU agencies (more details follow in Chapter 3). Therefore, the definition of who is (or are) the principal(s) is of the essence. Classic P-A studies define a principal as an actor “able to both grant authority and rescind it” (Hawkins et al. 2006, 7). This definition proves insufficient and partially incomplete when looking at the wider EU system including EU agencies. Therefore, for the purpose of this study I define principals as all actors participating in the act of delegating authority to an agent and exercising specific (*ex ante* and *ex post*) control mechanisms over that agent. This definition allows to “open our eyes, alter our current vision, and see the authority that now exists” within an ever-changing EU governance, i.e. a changed set of European actors with particular authority relations among them (Lake 2010, 589).

P-A relations in the EU are multiple and sometimes overlapping. According to scholars who analysed the EU through the lenses of P-A (Dehousse 2013; Léonard 2010; Pollack 2003), MS are naturally regarded as principals. The influence of MS’ representatives within the European institutions is still very high, especially in sensitive policy areas as the ones regarding migration.<sup>57</sup> The EU institutions that have been delegated and share legislative power – the Council acting together with the EP – are the agents of the MS, but they exercise a principal role as well (Curtin 2005; Dehousse 2008; Pollack 2000; Thatcher and Stone Sweet 2002): at the other end of the central P-A relation within the EU system stands the EU Executive body, the European Commission, acting as the agent of the Union legislators (Dehousse 2008; Franchino 2002; Pollack 2003). Another strand of the literature has critically examined and defined as inadequate this classic adaptation of the P-A model to the EU (Dehousse 2008; Kassim and Menon 2003). Nevertheless, departing from Kassim and Menon (2003), the P-A approach can be considered a promising explanation for future research under two conditions: the focus needs to be precisely limited to a policy area in which delegation takes place and the existence of multiple principals must be fully considered.

In the next third chapter, I present the specific theorised causal mechanism and its protagonists (i.e. the different EU principals and agents) for significant agency empowerment to occur as well as an empirical background analysis of the EU migration governance.

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<sup>57</sup> Givens and Luedtke (2004) have argued, for instance, that it is the politics at the national level that ultimately determine the success of harmonisation in a specific EU policy area.

### Chapter 3: The Causal Mechanism and Empirical Background

The subtle distinction within the more general and widely accepted notion of principals as presented in the previous chapter, enables to gain new insights into the role of EU agencies and by extension, of the European Commission. This chapter presents the theorised causal mechanism and its different actors as well as some empirical background on the EU and its complex P-A relations.

Delegation occurs because principals expect agents to perform useful functions for them, e.g. enhanced commitment or increased efficiency of decision-making, taking on responsibility for political conflict, uncertainty and blame (Thatcher 2011, 794). As stated in the introduction, the existing P-A literature usually regards the European Commission as the agent of EU MS collectively represented in the Council (e.g. Hawkins et al. 2006; Pollack 2003) and eventually of the EP as well (e.g. da Conceição-Heldt 2017). However, these evaluations have until now lacked to consider that the European Commission, in turn, exercises control and contributes to the creation of agencies, thus allegedly acting as a principal as well.

Since the 1990s, EU MS have shown their reluctance to expand the Commission's remit, rather preferring a delegation to new regulatory bodies outside the Commission (Kelemen and Tarrant 2011, 929). As a result, agencies turned to be acceptable instruments both for national governments and for supranational institutions as the Council and the EP. The European Commission had soon realised that since the Council of Ministers (i.e. the member governments) would not grant it additional power, the best solution was the establishment of specialised European agencies (Kelemen 2002, 95). The *agencification* phenomenon goes back to the 1970s, but it is only starting from the early 2000s that the European Commission introduced a new formal system to transfer power to agencies. The process of agencification was meant to legitimise EU policy-making through the role of technocratic expertise (e.g. Boswell 2008), which “promises to deliver socially and politically neutral decisions generating ‘Pareto-optimal’ solutions” (Wonka and Rittberger 2011, 890). Since 2000, the number of EU agencies has tripled from 10 to over 40 agencies (see also Scholten and van Rijsbergen 2014).<sup>58</sup> The relation between the European Commission and EU agencies was then officially defined in a 2002 Communication on the operating framework for the European Regulatory Agencies (COM(2002) 718 final), which builds on the 2001 White Paper on European Governance (COM(2001) 428 final). In the White Paper, the Commission envisaged the creation of new independent regulatory agencies, in order to improve the application of rules and policy across the EU. Regulatory agencies are directly created and ‘empowered’ by legislation and

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<sup>58</sup> For an exact list of EU agencies visit the website on Agencies and other EU bodies of the European Union available online under [https://europa.eu/european-union/about-eu/agencies\\_en](https://europa.eu/european-union/about-eu/agencies_en) (last accessed on 28.7.2019).

are usually governed by an administrative board, which should be responsible “for defining its general operating guidelines (work programme, rules of procedure, budget, appointment of the Director and the members of the agency’s other bodies)” (COM(2002) 718 final). In the past, the Commission covered in relation to EU agencies only a secondary function to the Council and the MS, which were the main authorities. As police, judicial, and customs co-operation have become increasingly supranational within the EU, the Commission’s role in this regard has changed and the proliferation of agencies followed (Groenleer 2009, 100). Against this background, the European Commission and its agencies constitute the multiple agents of the EU, while the EP, the Council and, by extension, the MS are the principals of these supranational agents, as I outline in detail in the following.

### **3.1 Primary Principals, Intermediate Principals, and Multiple Agents**

The distinction between collective and multiple principals has dominated for decades EU studies deploying the P-A approach. Although I acknowledge the benefits of this classic distinction, it turns out to be particularly troublesome when applied to the specific case of EU agencies as does the widespread conceptualisation of ‘principals’. As rightfully stressed by Léonard (2009, 374), the “delegation process in the EU is not as neat and simple as suggested by the classic “principal-agent” model”. In the edited volume by Delreux and Adriaensen (2017), the different authors offer new insights into the model’s adaptability to a changed EU landscape. At the same time, throughout their volume the scholars reiterate that an actor exerting control over an agent should not automatically be conceptualised as a principal (Delreux and Adriaensen 2017b). The rationale behind it is that delegation, and not control, constitutes the necessary condition for an actor to be considered a principal. In their understanding, an actor can be defined as a principal only if she or he grants and revokes authority to an agent through delegation. As I argued in the previous Chapter, this statement shows its limits when applying the P-A model to the specifics of EU migration policy. One of the few scholars, who highlighted the limits of the acknowledged ‘principal’ definition, is Trauner (2012). Trauner argues that the P-A literature helps to capture the multi-level character of the European institutional landscape. At the same time though, in the light of an ever-changing JHA realm, the same literature has neglected to explain under what conditions a particular institution may become a principal (ibid., 786). Trauner’s contribution (2012) thus proposes to define the principal not only based on her or his involvement in the legal procedure, i.e. through a delegation act officially granting authority to an agent, but also through its impact on the work and ‘institutional development’ of an agent. P-A scholars researching on the agencification process have primarily focused on *ex ante* controls as established in the delegation mandate (e.g. Wonka and

Rittberger 2010), while engaging less in the analysis of *ex post* controls, which might entail the involvement of other institutions. Trauner's study proves useful to start rethinking P-A relations within the EU system when it comes to agencies, but it overlooks a further pivotal actor in the development of JHA agencies, namely the European Commission.

Academics have analysed the agencification process and investigated its causes, which relate primarily to an ever-increasing integration of the Single Market and the concomitant growing workload of the Commission. Since the MS in the Council were against an increase in resources and staff of the Commission, out of fear of an imbalance in the power distribution at the European level, the compromise to solve the abovementioned challenge was the creation of agencies. Agencies could be delegated tasks instead of directly expanding the Commission's control and influence (Dehousse 2008; Léonard 2009). The Commission itself played and still plays a major role in the delegation process to agencies influencing their structure and powers. The Commission is a pivotal participant in this regard also after the establishment of the agency, because of its continuous relationship with these bodies. As a result, it is not only a central actor in the creation process of each agency, but it is also a significant player after the agency's establishment by controlling for instance its day-to-day activity. The two agencies in question, Frontex and EASO, do not simply work under the aegis of the Commission's respective DGs, but are also under the supervisory control of the Council (specifically the MS' representatives in the JHA realm) and the EP. This complex scenario calls for a better understanding of the different P-A relations in general, by outlining who exactly the principals and agents are within these relations.

The act of delegation itself stems from a prudent ponderation of the principal(s), who weighs the balance between the autonomy of the agent and the control mechanisms exercised by the principal. Within broader analyses of the EU's limitless 'appetite' for agencies (Gerardin, Muñoz, and Petit 2005; see also Busuioc 2009), scholars specified that an agency is 'independent' because it is, from a *legal* point of view, a separate body from the Council and the Commission, although being tied to these institutions' activities and controls. Academic studies on these concepts (the agency's independence and principals' control mechanisms) are interesting groundwork to grasp the constant dilemma faced by principals when designing an agency's institutional mandate, i.e. the struggle between making these bodies more independent, but at the same time seeking to make them more accountable for their activity by exercising control.

When it comes to JHA agencies, first the Commission, then, in a second phase, the Council and the EP exercise (directly and indirectly) control over the agencies' development and their day-to-day activity. However, these actors did not transfer *their* competences to the agent. The

competences delegated to EU migration agencies belonged before to the MS; hence, the analysis seems to suggest that delegation occurred directly from the national to the agency level. Nonetheless, it was the Council that officially created Frontex (2004) and then, together with the EP, established EASO (2010). The Council actually delegated only those functions that were previously exercised by the member governments. As Rijpma (2012) pointed out, Frontex and by analogy EASO as well, are agencies with a special character since they were transferred powers from the national level (vertical dimension) rather than from EU institutions (horizontal dimension), the latter nevertheless exercising “principal control” (Rijpma 2012, 88; see also Gerardin and Petit 2004). It is also true that in the specific case of Frontex the agency substituted the largely criticised former Working Party of the Council dealing with border control issues, namely the Common Unit for External Border Practitioners (hereinafter referred to as Common Unit), which developed from the existing Strategic Committee on Immigration, Frontiers and Asylum, in short SCIFA (Curtin 2005, 97; COM(2002) 233 final; more details on this Committee follow in Chapter 4).<sup>59</sup> Therefore, one could argue that the Council delegated to Frontex old tasks (plus new ones) that it had been carrying out through the SCIFA. At least from this specific institutional design perspective, the Council can be regarded as Frontex’s principal in a classic sense. To identify P-A relations in the case of EASO is similarly challenging, since the Support Office is under the control of both national authorities and EU ones. In the light of these complexities, the P-A model appears to be very useful to unravel the intricate EU institutional system as well as the specific relationships between agencies and other EU bodies. The identification of the principals depends on the definition acknowledged by the researcher.

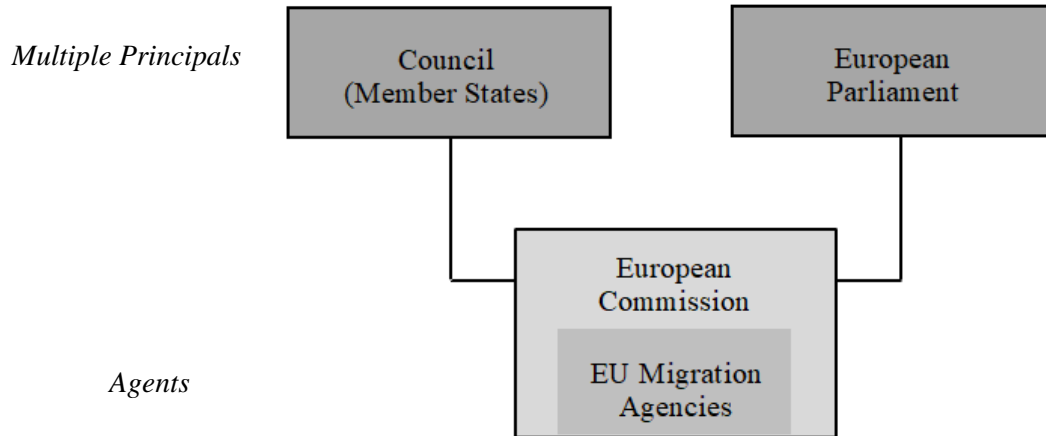
The following figures (*Figure 3.1(a)* and *3.1(b)*) illustrate how a classic application of the P-A model with regard to EU institutions including agencies would look like. The figures specifically combine the findings of Lyne et al. (2006) and Conceição-Heldt (2017). However, as I argue in the next step, this classic interpretation of principals and agents appears to be outdated and too simplistic considering how the whole institutional system has developed especially with regard to EU migration governance ever since the Lisbon Treaty (2009).

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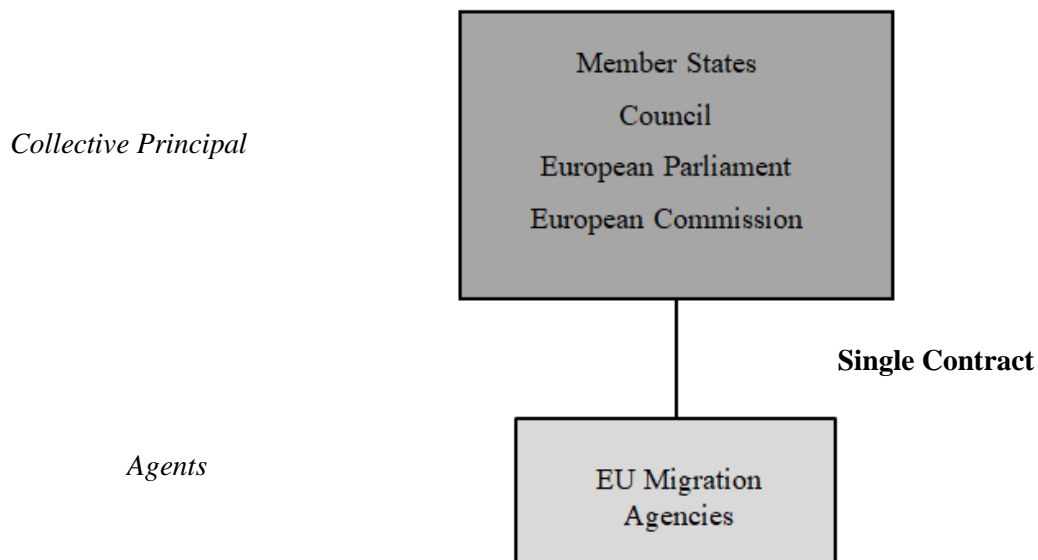
<sup>59</sup> The SCIFA was established in 1999 and is still the existing preparatory Committee within the JHA Council of the European Union.

Figure 3.1 *Principal-Agent Relations in the EU following Classic Interpretations*

a) Multiple Principals and Agents



b) Collective Principal and Agents



*Own elaboration*

Figure 3.1(a) shows the first possible relation between EU institutions and EU agencies from a classic P-A angle. According to this first application of the model, EU agencies are bodies of the Commission’s DGs and thus subsumed under the same *agent* category. In P-A terms, this particular categorisation of the Commission as supranational agent has also been referred to as ‘collective agent’. A collective agent is usually more hierarchical and follows less rigid decision-making procedures compared to a collective principal, e.g. the Council (Gastinger 2017). The fact that the EP is not formally entitled to negotiate the mandate of the Commission, since this remains an exclusive competence of the Council, raises (as mentioned in section 2.1) the wide debate addressed

for instance by Pollack (2006), who expressed some reservations in defining the EP as a principal of the Commission. Despite some reluctance, scholars argue that since on the one side the Commission has to extensively report to the EP as well as to take into account its interests and since on the other side the EP adopts resolutions together with the Council through which authority is delegated, the EP could be regarded as a principal of the Commission (da Conceicao-Heldt 2013, 206). Although the claims of the Council and the EP being the principals and the European Commission being their agent have been usually advanced with regard to the specific realm of trade negotiations, the same arguments are valid in the case of EU migration policy. What the current P-A literature lacks to consider, as I argued before, is the *multiple* character of the agents and the overlaps between the two categories (principal and agent). The thesis aims at closing this gap to demonstrate the increasing role and importance of EU agencies together with the European Commission. Whereas in existing EU research, it is still unsolved whether the Commission should be considered the agencies' principal at all and if so whether it is one of multiple principals or part of a collective principal as shown in *Figure 3.1(b)*, the upcoming analysis assumes that the Commission is indeed a principal of the EU agencies in question and specifically an *intermediate* one.

Dehousse has already highlighted the mentioned 'EU principals'-problematic as one of the main weaknesses of P-A research. According to the author, the P-A literature does therefore not take into consideration "some of the peculiarities of the EU setting" (Dehousse 2016, 70). Delreux and Adriaensen (2017b) have emphasised these same limits, advocating the need for more research, in order to advance the P-A approach further and make it more adaptive to contemporary changes. Consequently, although the Commission seems not to fit into the narrow definition of 'principal' given by P-A scholars (e.g. Lyne, Nielson, and Tierney 2006), this study acknowledges Dehousse's argument and considers the "multiplicity of principals" (Dehousse 2016, 70) and agents when it comes to EU migration governance.

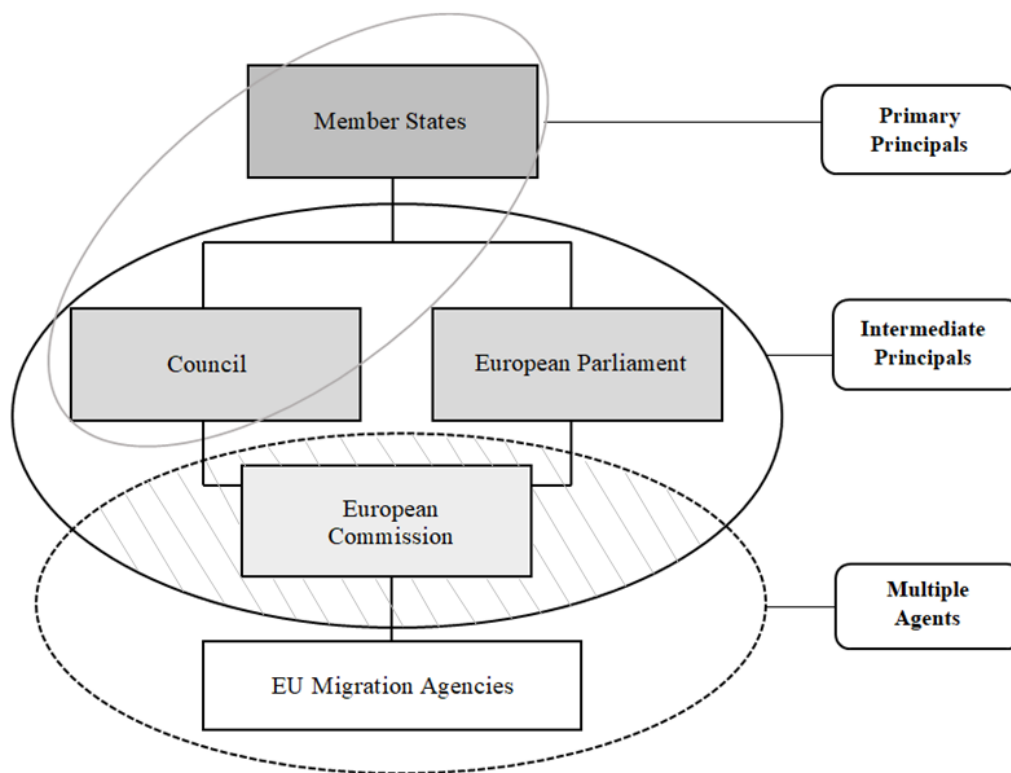
Defining the EU legislative and Executive as the multiple principals of EU agencies within a stiff hierarchical model as shown in the previous figures would leave the researcher with two unsolved issues. First, the *contract problem*, since the concept of multiple principals entails distinct contracts between each principal and the agent; and second, the problem of secondary delegation. The latter refers to the fact that the theorised multiple principals at the EU level are in turn agents of the principals par excellence, i.e. the MS. Following classic P-A assumptions, EU agencies' principals are neither purely multiple nor collective. Since existing concepts are not sufficiently narrow to define the peculiar P-A relations when agencies come into play and in order to solve the two abovementioned problems, the dissertation introduces the mentioned idea of *intermediate* principals. Although the concepts of multiple principals and intermediate principals partly overlap, I



argue that the latter notion is still more accurate in delineating the specific P-A relations and in solving inaccuracies that emerge from existing definitions. Hence, the notion of intermediate principals allows to both eliminate needless complexities related to the existence of a single or multiple contract and to distinguish between the primary principals of the delegation chain, namely MS, and EU institutions as secondary or intermediate principals.

This study consequently introduces a third graphic representation (*Figure 3.2*), which shows the hypothesised constellation of member states, which are the *primary* principals of the delegation chain collectively represented within the Council, and EU institutions as the *intermediate* principals. At the bottom of this diagram are the *multiple agents*: the European Commission and the (home affairs and) migration agencies.

Figure 3.2 *Primary Principals, Intermediate Principals, and Multiple Agents – A Model*



*Own elaboration*

The creation of the migration agencies Frontex and EASO was the result of both legislative measures and the agreement between three main EU institutions: the Council, the Commission, and (after its powers expanded) the EP. Each of these institutions is an essential player in the delegation process granting discretion to EU agencies. Again, actors must both have the power to grant and revoke authority to be principals. Since all three abovementioned institutions can jointly grant, but also potentially revoke authority to and from the agencies in question, they can all accordingly be

defined as ‘principals’. Nonetheless, these institutions exercise their power at the EU institutional level only *after* MS’ national governments, i.e. primary principals, decided to entrust that same authority they previously held to supranational bodies. The specific structure of the Council, which is composed of the different MS’ representatives, conveys the idea that this institution acts as a primary *collective* principal as well as an intermediate principal to the EU Executive. In view of this, the Commission is both an intermediate principal with regard to EU agencies and a supranational agent with regard to the MS, the Council and the EP. These overlapping roles are evidence of the convoluted EU system and call for a reinterpretation of existing P-A notions.

The representation in *Figure 3.2* does not neglect previous classic P-A model interpretations applied to the study of the EU. These models have depicted EU institutions as agents of the MS and, in more specific approaches, the EU Commission as the supranational agent of the EU legislative (first of all the Council), thus drawing a further distinction between legislative principals and executive (or judicial) agents (e.g. Pollack 2003). Nonetheless, existing P-A studies have dedicated very little attention to possible external conditions influencing the agent’s mandate, such as the institutional and political structure within which the agent acts. Plank and Niemann (2017) represent an exception in this regard. The authors have adopted this specific ‘external’ perspective when examining how the EU agent acquired increased ‘discretion’ due to the specific context it acts in during conflict resolution. In the case of specific external events requiring flexible action, the MS (in Plank and Niemann’s analysis the *principals*) have to rely more on the EU structures, such as in the selected case of their specific contribution, the EEAS. Not only do the authors once again underline the necessity to add research to the ‘agent’s side’ of the P-A relationship, they also emphasise the relevance of paying attention to a complex policy environment (Plank and Niemann 2017). The theoretical assumptions of Plank and Niemann guided the selection of the scope conditions in this study (as hypothesised in the upcoming sub-section 3.2.2 of this chapter).

In EU migration policy as in most other policy sectors, the European Commission is the initiator of the delegation process, proposing the draft regulation to create the agency. The need for expertise is one of the fundamental drivers of delegation, since the agencies are meant to be auxiliary bodies, with only *implementing* powers as established by the mentioned *Meroni* doctrine. The specific institutional constellation depicted heretofore makes an adaptation of the notion of principals unavoidable. The presence of more than just one principal creates competition between them, since the major fear principals have is that the agent might fall under the exclusive influence of a rival institution. For this reason, MS have usually refrained from granting additional powers to the Commission and the Commission is in turn afraid that the intergovernmental character of EU

agencies might become too strong. This mistrust between the principals is particularly evident when looking at the MS and the Council on the one side, and the Commission and the EP on the other. The EP has been usually favourable to new agencies acting under the aegis of the Commission, since it can then easily monitor the activity of these bodies through its overall enhanced supervisory powers over the EU Executive. The same however would not be the case if MS were to gain the upper hand and exacerbate the intergovernmental bias of these bodies (see also Curtin 2005).

Tensions among principals influence the creation of agencies and their institutional design (Dehousse 2016; da Conceição-Heldt 2017). When adapting for the first time the economic P-A approach to the realm of political science, Moe (1984) underlined the specific hierarchical character of any P-A relation. This hierarchical character was maintained and further outlined in Pollack's (2003) application of the model to the EU system. Although these studies are pioneers in this specific strand of the literature, they are missing the existence of further horizontal relationships and cases of delegation 'reversed'. These phenomena and additional aspects need to be taken into account, since they show that the description of a hierarchical dyad as presented in classic P-A studies appears to be beside the point when analysing the EU system.

The expanded remit of the agencies under study suggests that contrary to what the existing literature claims (e.g. Dehousse 2016; Ripoll Servent 2018), Frontex and EASO have become strong actors and essential players in the EU policy-making structure. In view of this, this study hypothesises that the different positions of the three EU institutions controlling EU migration agencies determined their significant empowerment after the 2015-16 Schengen crisis. In the following, the theorised 'principal' role of each institution, i.e. the primary principals (the EU MS), the Council, the EP and the European Commission, is analysed with regard to agencies.

### **3.1.1 Member States**

This section outlines the first set of principals of any EU institutional relationship, namely the Member States. When taking into account MS, P-A scholars have mostly, for obvious exemplifying reasons, considered MS as a collective actor within the Council. This research follows the same logic. The Council takes decisions on behalf of the national ministers and therefore represents a useful proxy when exploring national positions. As Pollack put it, "the member governments of the EU have assigned to themselves the central role in the governance of the Union" (Pollack 2006, 165) through the Council (and the European Council, which sets the guidelines of the EU legislation), but the Union has on its behalf also gained increased competences and powers over time. The delegation literature has usually argued that MS delegated powers to the EU for functional reasons and primarily for the purpose of establishing credible commitments and co-

operation amongst themselves (e.g. Majone 2001; Moravcsik 1998). Uncertainty and the need for expertise are further, already mentioned reasons that guided the MS' decision to delegate their authority and sign the EU treaties. Within the specific common migration policy, MS have been guided by these very same reasons: a double need for more credible commitments and for depoliticised expertise. The identification of common challenges and risks was a key dimension for collective action to take place and for MS to agree to such common action in sensitive domains as migration management. The institutional framework put in place by the EU for the identification of common threats and risks within the AFSJ made a substantial difference and allowed for regular discussions of such threats within several Council bodies and through regular risk assessments produced by migration agencies (Monar 2015b). Without the mentioned institutional structures and capabilities, a common risk assessment at the EU level would be impossible and so would be the subsequent policy-making. At the same time, due to issue sensitiveness, MS withheld their right to have the final say: they have retained their final competence and ultimate control in all operational matters regarding the AFSJ domain (see for instance Trauner and Ripoll Servent 2015a). Ever since the initial development phases for the creation of a common migration policy, MS set up "transgovernmental venues [...] dominated by personnel from Interior and Security forces". As time passed by, decisions on migration matters were increasingly taken within the EU framework, allowing nonetheless national interior ministries to continue to exercise control in this realm (Guiraudon 2017, 4). Both border control and asylum policy sectors are utterly important to the EU national governments and each of them has agreed with the establishment of the AFSJ to *share* competences in these matters. Therefore, by following a logic of regression, the primary principals of any EU institutional body are the MS.<sup>60</sup>

Whereas most of the literature considers MS collectively as a unitary actor, i.e. the Council, some P-A studies have been arguing that only certain MS act as principals by delegating to EU institutions and controlling their fellow MS (Ripoll Servent 2018). Other contemporary studies have analysed MS as the only principal of the P-A relation without considering secondary chains of delegations (see Plank and Niemann 2017). It is not the purpose of this dissertation to get into the merits of whether MS should be considered the "ultimate principals" of the EU system or not (see arguments made by Brandsma and Adriaensen 2017). Nevertheless, it is the intent of this analysis to regard MS as the *primary principals* and as co-players when it comes to the significant empowerment of agencies. The preferences or rather, in the understanding of this research, the positions of the MS should not be taken as a given or an *a priori* assumption of the model, but as a

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<sup>60</sup> Some scholars pushed this logic of regression further, arguing that it is the *people* in a Rousseauian sense to represent the ultimate principal of the EU (Brandsma and Adriaensen 2017).

variable with strong explanatory power (e.g. da Conceição-Heldt 2011; Elsig 2010a).

Although the existing P-A and IR literature (e.g. studies with liberal intergovernmentalist approaches as presented in section 1.1) emphasises domestic preference formation and accordingly explicates different national preferences, this study investigates the ‘official national positions’ within EU institutions, i.e. the European Council and the Council, rather than engage into a cumbersome analysis of domestic preference formation. Hence, when referring to ‘preferences’, I imply the positions held by national authorities in the analysed official documents. Accordingly, the MS’ positions were collected by looking at statements and official documents issued by the European Council, the Council of the European Union as well as the explanatory memoranda of the Council meetings, in order to outline a background picture before any decision was taken.

Contemporary analyses (e.g. Biermann et al. 2017; Ripoll Servent 2018) ascribed a central role to the EU countries’ interests and the bargaining dynamics into which they engage, in order to explain political outcomes and power plays. Scholars further emphasised unilateral tendencies among MS that undermined the whole Schengen system and threatened its fundamental structures (Börzel and Risse 2018). Yet, not only is an evaluation of preference constellations extremely challenging, it is also falling short since tracing preference formation within the single nation states tends to overlook the role of supranational institutions in the decision-making process.<sup>61</sup> Moreover, during the last few years existing studies on the Schengen crisis and on the consequent measures taken by the EU tend to underestimate the reform of the border agency and the planned one of the Support Office by generalising these events and asserting that no major changes have taken place in the migration policy area, so far.

Against this backdrop, the empirical part of the dissertation takes into account the positions of MS, i.e. the primary principals, in order to gain insights into the hypothesised significant empowerment of migration agencies after the Schengen crisis. In order to do so, I analysed the national delegations’ positions within the Council’s Working Parties and Committees as well as the conclusions of the MS’ heads of state and government in the European Council. The dissertation advocates that MS are the first principals of the delegation sequence leading to the establishment and reinforcement of agencies. Two conditions are hereby fulfilled: first, the rationality behind the delegating act, since all actors are assumed to act rationally by weighing costs and benefits; and second, the identification of the act of delegation itself, which in the case of agencies corresponds to the establishing (or replacing) regulation of each agency. The new phenomenon that is at the centre

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<sup>61</sup> Parkes (2015) had already an inkling that MS are not the only or ultimate decision-makers, for instance, in border control matters. He acknowledged the relevance of additional determinants by considering the role and agenda of each EU institution involved in the decision-making process.

of my analysis is the reform that significantly empowers each agency and thus the adoption of a new regulation substituting the establishing one.

### 3.1.2 The Council of Ministers

Despite the predominance MS still enjoy in some issue areas, European institutions have become relevant ‘engines’ of the European integration process over time (Pollack 2003). At the same time, MS still dominate the EU scene through two important supranational institutions: the European Council and the Council of Ministers, the latter meeting regularly (once a month) in different configurations depending on the issues being discussed. Directly related to the role of primary principals (i.e. EU MS) and their positions are hence the positions of the Council within the institutional web of multiple supranational principals.

With regard to the specific decision-making relevant for the development of the AFSJ, the JHA Council is the institution in charge of elaborating common policies on cross-border issues, “with the aim of building an EU-wide AFSJ” (Council of the European Union 2018b). The Council of JHA has expanded its members over the years as a logic consequence of the EU enlargement, which in turn led not only to a shift of the EU external border but also to an increasing heterogeneity within the EU institutions in general. The so-called ‘big bang’ enlargement of 2004 through which the EU borders were shifted to the East, required further the “intensification of the strategic relationship with eastern and southern neighbours” as well as enhanced co-ordination and co-operation among MS (Council of the European Union 2004b, 2).

Besides the challenges EU integration has to face in the AFSJ, the major problem related to decision-making within the JHA Council is that sometimes primary principals, due to otherwise cumbersome and wearing negotiation periods, resort to other venues outside the EU structures to “circumvent the lengthy decision-making processes of the Council” (Lavenex 2014, 376).<sup>62</sup>

This dissertation assumes the Council to be one of the major intermediate principals in the hypothesised delegation path. It is the first link of the delegation chain connecting the MS (primary principals) to the supranational agents. The Council is hence the first *intermediate* principal, formally delegating the authority granted by EU MS to agencies through the adoption of the establishing regulation and exercising monitoring functions.

Each migration agency’s regulation has been issued by its intermediate principals, i.e. either by the Council of the European Union alone or in co-decision with the EP after the Lisbon Treaty, following a call from the European Council (e.g. Frontex’s regulation of 2016). The European Council as the body representing the MS’ heads of state and government usually pushes the

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<sup>62</sup> More details follow in Chapter 4.

intermediate principals to take action in solving migration related matters. The European Council is the second closest institution to the primary principals' positions, primarily exercising political leadership in EU migration policy matters.<sup>63</sup> Although giving an impulse for agency creation, the European Council does not officially delegate powers to or control the activity of agencies and is consequently not included in the model as shown in *Figure 3.2*.

Political leadership in AFSJ related matters impacting the decision-making of the EU legislative has been soon (and increasingly) taken over by the EU's supranational agent, the European Commission (more about the role of the Commission is presented in the upcoming corresponding sub-section 3.1.4). The exercise of leadership has always represented a complex phenomenon in the EU AFSJ, not only because of the strong role hold by the primary principals, but also because of the delicate institutional balance at the EU horizontal level. EU intermediate principals, especially the Council, and supranational agents, that is the Commission through its right of initiative, have progressively provided a dynamic framework to the AFSJ that allowed to reach compromises among diverging national primary principals' positions.

The strategies adopted by the Council, as an intermediate principals, to lead MS, as the EU's primary principals, towards a common approach to migration and related issues were of the utmost importance. In the past and before the empowerment of the *second* intermediate principal, the EP, with the entry into force of the Lisbon Treaty (more details follow in sub-section 3.1.3), the relation between the Council of Ministers and EU agencies was quite hierarchical. The first intermediate principal could act on its own in establishing NMIs at the EU level upon a proposal of the Commission as its supranational agent; a formal involvement of the second intermediate principal, the EP, was not mandatory (Curtin 2005). Prior to the Lisbon Treaty (2009), the Council would ask the EP only for its opinion on the Commission's proposal for the establishment of an agency. When the first intermediate principals then established the agency (e.g. Frontex), it would not delegate its own exercised powers, but rather transfer to the agency competences and tasks which belonged to the primary principals.

The Council has a "heavily hierarchical structure of policy-making", which develops over four different levels (Lavenex 2014, 374ff.). The first level corresponds to the Committee of Permanent Representatives of the Governments of the MS to the EU (in short Coreper)<sup>64</sup>. Agendas for the

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<sup>63</sup> As demonstrated in the two upcoming empirical chapters (Chapter 4 and Chapter 5), the European Council's leadership reached its peaks during the Tampere meeting and during the extraordinary session of September 2001 immediately after the 9/11 terrorist attacks (European Council 2001b; Monar 2015a). Afterwards, the Council and especially the Commission took the lead.

<sup>64</sup> Coreper decided to create specific working structures as SCIFA to establish the AFSJ (Council of the European Union 2004e). The SCIFA, which is made up of senior officials, was thus established during a Coreper meeting in 1999 and although it should have been a temporary 5-years structure, in 2004 MS agreed to continue its activities, which they kept prolonging up until today.

Council are prepared by Coreper II, which consists of heads of mission (i.e. ambassadors) preparing the work of four Council configurations, *inter alia* of the JHA Council, which is in charge of developing the AFSJ and related issues.<sup>65</sup> The second level in the JHA Council's policy-making right after the Coreper is represented by four special *co-ordinating* Committees, which are further preparatory bodies usually meeting once a month. Among these four committees, which gather together senior level officials and which were initially set up only for a transitional period of five years, is also the mentioned SCIFA. The SCIFA has become (together with the other three co-ordinating Committees) a permanent structure that reflects the still very strong intergovernmental character of JHA. Ever since the Amsterdam Treaty (1999), the SCIFA has had the essential task of providing strategic guidelines to the Coreper in matters related to immigration, frontiers, and asylum, thus giving substantive input to the primary principals' discussions within the Council. Finally, the two other levels of policy-making within the Council involve several working groups composed by specialists of national ministries and operational bodies.

Before the Treaty of Lisbon and the expansion of the EP's power, the Council exercised an act of delegation in form of an official contract (the establishing regulation). It further exercised (and currently still exercises) wide monitoring powers to ensure the agency's compliance with its mandate and it can revoke the granted authority. However, the powers that were delegated to the agency were formerly exercised by the primary principals and without their concession and acknowledgement, the intermediate principal would not have been able to delegate them.

In sum, following the P-A logic the Council is defined as an intermediate principal, since it delegates authority to and exercises powers of political supervision over agencies (such as hearings of their Executive Director, in short ED, or activity reports). Furthermore, the Council shares with the EP the task of being the 'budgetary authority' of agencies (more details follow in Chapter 4).

The situation of the Council as *first* intermediate principal holding the upper hand in agencies related matters changed with the introduction of the co-decision procedure, which deeply transformed the *second* intermediate principal's role. After long struggles, today the EP is finally able to counter-balance the often prescriptive and control-oriented approach of the Council – especially in migration related issues, a policy area within which the positions of the two institutions frequently conflict (e.g. Trauner and Ripoll Servent 2015b). During the decision-making process, after the supranational agent has initiated the process by drafting and submitting a legislative text, the EU legislators need to closely interact with each other. According to the COD, any legislative proposal issued by the European Commission is first submitted to the EP, which

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<sup>65</sup> For more details see the Council's website on Coreper available online under <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/coreper-ii/> (last accessed on 16.2.2019).



either approves or amends it. If the EP's approved or amended proposal is then in turn approved by the Council, the legislative text is consensually adopted. If the Council amends the proposal as well, then the text goes back to the EP for a second reading. If no agreement can be reached, a conciliation committee is convened, in order to seek the approval of both intermediate principals through a third reading. Whereas in this process the Council usually represents the primary principals' positions, the EP reflects the variegated landscape of political parties in the EU.

In order to understand the peculiar relation between the first intermediate principal and EU agencies, it is relevant to briefly consider the dynamics between the three EU institutions, i.e. the Council, the Commission and the EP, all of which correspond to the agencies' intermediate principals according to my theoretical assumptions. As observed by Kelemen (2002), the primary principals represented in the Council are political principals delegating authority to supranational agents at the EU level. From this perspective, the Council itself represents an institutional agent of the EU national governments (vertical dimension). From an horizontal perspective, the EU supranational agent of the Council in terms of executive powers is the European Commission, whose activity is monitored by both the Council and the EP (since Lisbon) through the peculiar system of committees (see also the analysis in Bergström 2005 referring to such a system as comitology). If MS have been defined as the 'principals *par excellence*', the literature widely acknowledges to the European Commission the role of supranational 'agent *par excellence*' (e.g. da Conceição-Heldt 2017; Pollack 2003). In this specific case, the two roles of the Commission as both agent (with regard to primary principals, i.e. MS, and intermediate principals, i.e. the Council and the EP) and principal (with regard to agencies) overlap (more details follow in sub-section 3.1.4).

The continuous, underlying institutional struggle between the Council and its supranational agent, resulted, as an indirect and not foreseen consequence, in the establishment of agencies, since primary principals have always been against an additional transfer of power and resources to the European Commission (Kelemen 2002). The Council as the first intermediate principal contributes as one of the two EU legislators to the integration process through both hard and soft law. It has not only contributed to the development of the AFSJ through legally binding decisions, but also through numerous evaluation reports, recommendations, assessments and studies (soft law) that have highly influenced the relation between the legislative and EU agencies as well as the delegation mandate of the latter. Although the Council exercises legalised control over the multiple agents of the EU, the agencies under focus, Frontex and EASO, had eventually the chance to develop outside these institutional constraints given the growing significance of their activity in the migration sphere (Trauner and Ripoll Servent 2015b).

### 3.1.3 The European Parliament

The European Parliament is the second intermediate principal that acts together with the Council as a supranational legislative actor. Starting from the 1990s and especially after the Lisbon Treaty, its increasing power allowed it to assert a correspondingly greater role in designing the agencies' mandate and overseeing the EU's multiple agents. The EP can thus be identified as a "political principal" alongside with the Council (Kelemen 2002, 95).

The literature has widely acknowledged the fragmented system of the EU migration governance, but continues to assume that migration policy problems are still tackled in state-centred terms rather than through a supranational approach (e.g. Geddes 2015). The 2000s witnessed a steady increase of competences delegated to EU institutions. Co-decision was extended to the migration policy area, thus giving the Council *and* the EP a chance to untie migration dilemmas through a supranational approach. Initially, academia argued that in EU migration policy the EP tended to more liberal positions than the Council before it was granted more legislative power with the entry into force of the Lisbon Treaty. The EU's second intermediate principal had usually positioned itself as a 'pro-migrant' actor and a committed promoter of civil liberties. After the expansion of its role in 2009, scholars observed, however, that the Parliament tended towards more consensual practices in relation to the Council, given the new legislative procedure and that the EP sometimes moulded its positions after those of the Council, in order to legitimise its new role (Trauner and Ripoll Servent 2016, 1424). Hence, prior to the adoption of the Lisbon Treaty, the EP was usually described as 'good' in the area of migration policy, unlike the Commission and the Council, both perceived as 'bad', because they were more likely to follow the primary principals' agenda. The idea that the second intermediate principal has always struggled for more transparency and civil rights protection, thus gaining a virtuous reputation, was nevertheless challenged after 2009, when scholars referred to the capitulation of the EP under governments' pressure – specifically, its acceptance of the returns directive (Arcarazo 2009).<sup>66</sup>

P-A analyses have not always considered the EP as a potential principal due to its limited powers before the introduction of the Lisbon Treaty. When it comes to the decision-making at the supranational level with regard to migration issues, 'politics' remain a constant obstacle. Despite the great achievements reached through an expansion of competences at the EU level, it remains troublesome to separate the *national* from the *supranational* and to keep politics outside the migration sphere (e.g. Ripoll Servent 2011).

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<sup>66</sup> See Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98 (European Parliament and Council 2008). A "directive" is a legislative act that sets out a goal (or goals) that all EU MS must achieve, but it is up to the individual countries *how* to reach these goals.

The intrinsic weakness of the EP, which ended (partly) only after the Treaty of Lisbon, hindered it from acting as a political (intermediate) principal vis-à-vis the EU's multiple agents. Up until the Treaty of Lisbon, the Parliament regarded the Commission more as its ally in promoting European integration than as its subordinated agent and bureaucracy in need to be monitored (Kelemen 2002). The first two years after the entry into force of the Lisbon Treaty were a significant period of transition in the institutional landscape of JHA. Whereas in the past it had been usually only consulted by the Council, the EP had now the power to amend or block a legislative proposal including those amended by the Council within the COD. In the 2006 resolution on the progress made in the EU towards the AFSJ,<sup>67</sup> the EP had already expressed some resentments due to its circumscribed involvement at that time in the related decision-making process. The Parliament therefore called on the Council "to speed up the handling of preliminary rulings in AFSJ matters" as well as "to provide for extending codecision with Parliament and qualified majority voting in Council to all areas, such as legal immigration" (Lavenex 2014, 375).

After the expansion of its legislative powers, the EP allegedly changed its approach towards the European Commission and required on its behalf stronger oversight mechanisms to control this supranational agent. The same demands for enhanced control and transparency were subsequently made with regard to EU agencies as well, exemplifying the mentioned dilemma that principals are faced with when acknowledging their agents independence, but at the same time seeking to exercise more control over their activity. Whereas once the EP had been allotted merely an "observer role" towards EU agencies (Wolff and Schout 2013, 309), the subsequent developments of migration agencies show that the second intermediate principal was a pivotal actor in the reform process of these bodies. The EP thus stands as an intermediate principal of migration agencies not only for the control it exercises over them, but also because it has gained increased influence in designing their mandates as a consequence of the introduced co-decision procedure.

### **3.1.4 The European Commission**

The European Commission has been generally identified by the P-A literature as *the* EU bureaucratic agent or the primary executive actor of the EU (e.g. Franchino 2007; Hawkins and Jacoby 2006; Pollack 2003; see also Kelemen 2005), whereas multiple interpretations have been offered regarding the Commission's principals. Either they have been ultimately identified with the MS governments collectively represented in the Council (e.g. Pollack 2003) or with the Council *and*

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<sup>67</sup> For further details see Paragraph 2 of the EP 2006 resolution on the progress made in the EU towards the AFSJ available online under <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0525&language=EN> (last accessed on 21.4.2019).

the EP together (da Conceicao-Heldt 2013). The classification of the Commission's principals usually depended on the policy area researchers were looking at (more on the importance of the policy area is outlined in the upcoming sub-section 3.2.2 on the scope conditions).

Delegation and discretion granted to the European Commission before the Lisbon Treaty have been examined from a general perspective by Pollack's renowned work on European integration (Pollack 2003). According to this dominant perspective, the Commission is the agent of MS not in just one specific policy area, but across issue areas, such as trade policy (e.g. da Conceicao-Heldt 2013) or the policy realm circumscribed by the European Convention of Human Rights (Hawkins and Jacoby 2006). However, from a P-A perspective the most compelling aspect of the EU Executive is, in my opinion, its twofold role as an agent and (intermediate) principal at the same time. The Commission should be considered as a separate entity from its agencies. The creation of further institutional bodies adding up to the EU Executive's polycentricity can therefore be captured from a P-A perspective by the notion of *multiple agents* rather than by the notion of 'collective agent', the latter entailing subordination and subsidiarity instead of the idea of further empowered institutional entities autonomous from the Commission.

Although the Commission is a bureaucratic agent of the Council and the EP, it also plays an agenda-setting role in the EU policy-making process, thus exercising in turn influence on the EU legislative and hence on its principals. This relates to the mentioned 'reversed delegation' concept and its circular character. Ever since its establishment, the Commission has been seen by analysts as an institution striving for more authority and seeking to expand its influence (Kelemen 2005). Since primary principals would not agree on such an 'empowerment' of the EU Executive, the proposal of creating regulatory bodies situated within the hierarchy of the Commission (more specifically of its DGs) appeared as a perfect compromise. Starting from the fact that the European Commission maintains its control over EU agencies – e.g. through its primary role in designing their mandate by submitting the establishing regulations' proposals to the EU legislative –, the dissertation aims at demonstrating the fast evolution of EU agencies in the migration policy realm and their subsequent significant empowerment through the reform initiatives of the EU Executive. The European Commission is usually regarded as the supranational agent of the EU MS by a transfer of power from the national to the supranational level (e.g. Franchino 2007; Hawkins et al. 2006; Pollack 2003). Bridging from this widespread perspective to the contemporary EU system including agencies, I argue that the European Commission, in turn, 'empowers' other European structures, namely agencies, by being the initiator of EU legislation and by participating later in the process of delegating further functions to and monitoring agencies in specific policy areas.

EU regulatory agencies act under the aegis of the Commission, which additionally oversees the development and implementation of EU migration law at the domestic level. After the Treaty of Lisbon, the European Commission started to gradually expand its organisational structure in the area of JHA (Lavenex 2014, 373ff.) and the new DG HOME was accordingly restructured in order to give higher priority to the topic of immigration, which had “outgrown the Home Affairs portfolio” (Collett 2015, 2).<sup>68</sup> The newly structured DG HOME should have thus become “a policy *coordinator* as much as a policy *initiator*”, in order to guarantee the coherent and consistent pursuance of an ever complex policy landscape (ibid., 4). DG HOME managed over the years to increase the overall budget allocated to its agencies as well as two funds, the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF), the latter composed of two instruments, i.e. ISF-Borders and Visa and ISF-Police (see also sub-section 4.1.2).<sup>69</sup>

The Commission proposes the agency’s institutional design and officially presents the draft mandate of each agency. Besides the fact that “[e]ach regulatory agency must be created by a specific legislative instrument, on a proposal from the Commission” (COM(2002) 718 final, 7), the Commission *de facto* delegates together with the Council “(executive and administrative) powers and tasks to what are formally termed the ‘decentralised agencies’ of the European Union” (Curtin 2005, 89). Since EU agencies are from a supranational perspective “closer to the Commission than to any other institution or actor” and although MS outnumber by far the Commission’s representatives within the agencies’ management boards (MB),<sup>70</sup> agencies do not necessarily follow national interests or act on behalf of national executives. The presence of two EU Executive’s representatives in the MB is not the only way the Commission monitors its agencies and, more generally, the implementation of EU legislation. DG HOME ensures important monitoring activities over Frontex’s and EASO’s policy activities as well as its budget. The operational units of the DG HOME (sub-)directorates are “involved in numerous contacts at working level, co-ordination meetings, providing opinions on annual work programme, draft budget, staff policy plan and monitoring of their implementation”. Moreover, the Commission guarantees contacts at higher

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<sup>68</sup> As a starting point, in 2010 the second Commission of Barroso divided the former DG for Justice, Liberty and Security into two new DGs, i.e. DG HOME and DG justice (DG JUST). These two new DGs were then accordingly expanded and more units were created within each of them.

<sup>69</sup> These two funds represent the two Home Affairs financial Instruments. The share of Home Affairs in the EU budget is less than 1%, but its overall resources have increased. The Home Affairs funding for the period 2014-2020 amounts to €9.26 billion and reveals the importance of this policy area at the EU level to ensure the adequate implementation of the priorities set. For further details see the Commission’s website on funding available online under [https://ec.europa.eu/home-affairs/financing/fundings/index\\_funding\\_en](https://ec.europa.eu/home-affairs/financing/fundings/index_funding_en) (last accessed on 12.3.2019).

<sup>70</sup> The Management Board is the executive and administrative decision-making body of each agency. It is usually composed of one representative for each country that is a member to the agency and two representatives of the European Commission.

level, i.e. between the Director-General and the ED as well as the Chairs of the MB of each agency throughout the year. With regard to the budgetary monitoring, the European Commission takes part in the budgetary procedure through the implementation of the annual EU budget (ibid., 22).

While its role expanded over the years, the Commission has both advocated for more liberal measures, but sometimes also for more restrictive ones in the area of migration. The European Commission wants to be an ‘ally’ to the first intermediate principal, the Council, when it comes to the enhancement of border controls and the fight against illegal immigration; at the same time, it champions less restrictive and liberal positions with regard to asylum issues, which brings it closer to the positions of the second intermediate principal, the EP (e.g. Bonjour, Ripoll Servent, and Thielemann 2017, 5; Lahav and Luedtke 2013). This dichotomy displays its impact also on the development of the two agencies involved, Frontex and EASO, as outlined in the upcoming empirical Chapter 4 and Chapter 5.

### **3.2 Operationalisation of the Causal Mechanism**

The researcher can learn about the effects of a crisis and draw conclusions regarding possible future developments based on the changes that are visible at present, only through the collection of empirical evidence (Falkner 2016). The focus of interest of this study is threefold. First, I am interested in the changes triggered by the migration crisis. Second, I seek to gain insights into the EU decision-making process in the sub-policies of border control and asylum characterised by a relatively ‘new’ co-decision procedure. Third, I aim at identifying the institutional actors involved in the development and reform process of migration agencies as multiple principals and multiple agents by adapting P-A concepts to the EU migration governance.

This dissertation identifies the Schengen crisis as the trigger X of the causal mechanism, which is a necessary but not sufficient condition for the hypothesised outcome Y, namely a *significant* agency empowerment, to occur. By the term crisis, this study understands “a state of affairs in which a decisive change [...] is imminent” or, in other words, a difficult situation in which politicians are confronted with the significant need to take swift action and to achieve reforms in a limited period of time (Falkner 2016, 219). The crisis explored in this dissertation is the 2015-16 migration crisis as the external event that simultaneously determined the crisis of the Schengen system and thus a ‘crisis of managing the crisis’.

In the upcoming Chapters 4 and 5, I seek to first provide information on the agencies’ mandate prior and after the crisis to then test the deductive theorised causal mechanism as presented in the next sub-section. Since I lean towards classic P-A assumptions, which I deductively drew from

existing P-A studies, while applying a process-tracing method, I further hypothesise that the crisis determined the outcome along with two further explanatory factors, or independent variables, corresponding to two principals' 'characteristics', namely their positions and the decisional rules they have to follow. I assume that these characteristics are pivotal to understand the entities and activities of the theorised causal mechanism to be tested. Around these identified intermediate<sup>71</sup> explanatory factors (the principals' positions and the institutionalised decision rules at the supranational level), I formulated two propositions. The 'scope conditions' for the theorised mechanism to play out are different in the two cases and are, together with the relevance achieved by the agent over time, at the heart of the third proposition.

### **3.2.1 Conditions for Significant Agency Empowerment: Three Propositions**

The first hypothesised part of the theorised mechanism triggered by the crisis corresponds to the primary principals' positions. In line with P-A claims, the interests of the principals, usually MS, determine the delegation mandate of the agent, the mechanisms of control, and the future agent's behaviour. According to established P-A arguments, 'heterogeneous preferences' among principals rise the probability of delegation to an agent or, in classic P-A terms, of an increase in the agent's discretion (e.g. da Conceição-Heldt 2011; Elsig 2010a). Against this 'preference heterogeneity', MS are not able to co-operate without delegating more tasks and discretion to an external institutional body (cf. argument in Ripoll Servent 2018). Leaning towards this assumption, I expect that when primary principals have diverging positions, a significant agency empowerment is more likely to occur by replacing the agency's old mandate with a new one. In the end, the primary principals approve of such an empowerment, hoping thus to enhance their chances for co-operation in the future. Although scholars have deployed it quite often, the concept of MS' 'preferences' comes with notable caveats. From an empirical and methodological point of view, tracing the preferences of every country is extremely challenging, since a preference always entails one or more terms of comparison. Moreover, the researcher needs to struggle with the problem of *fluctuation* across preferences. Therefore, rather than concentrating on the domestic preference formation in each EU country, I intentionally explore the official *positions* MS hold in migration related documents rather than engaging in a cumbersome inquiry on their *actual* preferences. Examining preference formation within the Council can become highly problematic and using the domestic debates as a proxy for MS' positions at the supranational level is often misleading (Bonjour, Ripoll Servent, and

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<sup>71</sup> By 'intermediate', I refer to the fact that these factors determine the mechanistic sequence of the hypothesised parts of the causal mechanism *between* the cause (or trigger) and the outcome of interest.

Thielemann 2017).<sup>72</sup>

Against this background, this analysis explores the MS' positions and considers what Biermann et al. (2017, 16) defined as the MS' different exposures "to negative externalities". The authors argue that the different exposure to migratory pressure experienced by MS led to different negative externalities, which determined "a conflictual preference constellation" (ibid., 12). Their study further outlines how MS tend to stability and to the maintenance of the *status quo* when negotiating at the supranational level (see also Trauner and Ripoll Servent 2016). This dissertation seeks to combine these externalities with the specific context within which institutional change in EU migration policy occurs and include them in the analysis of MS' positions. The diverging MS' positions should thus be the starting point of the analysis, but not represent its core, which rather lies in the power relations between the different actors involved in the migration policy- and decision-making processes. Hence, this study refers to the *positions* rather than to the preferences of the primary principals, since tracing the preference formation in the single nation states is not within the scope of this dissertation. As mentioned above, classic P-A perspectives assume further that the agent gains more 'discretion'<sup>73</sup> when principals have heterogeneous preferences ("but not so extreme as to vitiate the gains from delegation") and when the agent figures out on its own a way to achieve it (Hawkins et al. 2006, 28). In the light of the theorised distinction between primary and intermediate principals, given diverging positions among primary principals, multiple agents at the EU level are likely to use possible impasses, as those resulting for instance from a crisis, and push for a significant agency empowerment.

*Proposition 1: When the positions among primary principals diverge and result in deadlock situations, multiple agents are more likely to push intermediate principals towards significant agency empowerment.*

This first proposition stems from existing arguments, acknowledging the additional role of those actors as the European Commission, which combines overlapping roles by being both an intermediate principal to the EU agencies as well as a supranational agent to the EU legislative.<sup>74</sup>

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<sup>72</sup> Liberal intergovernmentalists have tried to solve these problems by aggregating domestic preferences and focus on the role of domestic groups and their interests. Other authors have explored the role of experts and civil society (e.g. NGOs) as relevant influential actors in EU policy-making (e.g. Kaunert, Léonard, and Hoffmann 2013).

<sup>73</sup> As stated earlier (see section 2.1), discretion is a prominent concept in delegation literature that this study does deliberately not engage with, in order to grasp the notion of *empowerment*.

<sup>74</sup> Hence, following the first proposition, in a first step the EU agency in question asks its intermediate principals (the Commission, the Council and the EP) for a significant empowerment of its mandate. In a second step, the agency's requests might then again be officially forwarded by the Commission in its role as a supranational agent to the Council and the EP, which are its intermediate principals.



The study tests how much an emergency crisis and supranational institutions as intermediate principals do matter in determining a significant agency empowerment. My argument is that when MS need to take decisions to carry out swift actions on the ground, but cannot agree on them because of their diverging positions, multiple agents are more likely to propose to delegate more authority to supranational agents in order to solve this deadlock. The roles of primary principals as well as intermediate principals and multiple agents need to be analysed separately, in order to understand the role and the significance of EU institutions during the process eventually leading to a significant agency empowerment.

The second identified explanatory factor within the causal mechanism is inherent to the specific *intermediate* principals' structure. As shown above (section 3.1), the unconventional structure of EU agencies' principals does not entail neither multiple principals in the classic sense, that is each of the principals delegating power and holding a distinct contract with the agent, nor one collective principal that acts "in concert under a single contract" (Hawkins et al. 2006, 35). In the case of EU agencies, the 'contract' and further decisions regarding it, stem from the peculiar structure including both primary and intermediate principals acting in the decision-making process. For matters related to migration, the Council follows the mentioned Qualified Majority Voting, in short QMV (which corresponds to a system of weighted votes – see also section 2.3) as well as the overall inter-institutional decision-making procedure including the further co-legislator, i.e. the EP.

According to acknowledged P-A assumptions, the agent is more likely to profit from a deadlock situation and aim at an expansion of its range of action when unanimous decision rules within the principal are in place; conversely, majoritarian decision rules should constrain the agent more (e.g. Hawkins et al. 2006). Pollack (2003, 44) relatedly maintained that the "ability of an agent to exploit conflicting preferences among the principals also depends crucially on the decision rules" governing the adoption of new legislation (e.g. the adoption of a regulation establishing or reforming an agency). Therefore, it is not simply the presence of diverging positions among the primary principals, but also the specific decision rules governing the destiny and mandate of an agent that eventually allow the agent to profit from a conflict among its principals. *Ceteris paribus*, the agent's room for 'manoeuvre' is greatest when the decision rule is most demanding, e.g. unanimity; and, on the contrary, it is more restricted when decisions can be adopted by super-majority, simple majority or minority. Consequently, when the principals have to follow more demanding decision rules as for instance unanimous ones, multiple agents have better chances to push for a significant agency empowerment, whereas given majoritarian decision rules among principals, the agent is less likely to be significantly empowered.

When adapting these assumptions to the specific decision-making procedure of the EU, a clear distinction between unanimous and majoritarian decision rules is applicable only to the Council, where decisions are taken following qualified majority voting in most policy areas, including the policy area on migration (according to Article 16 of the Lisbon Treaty). The Lisbon Treaty did not only replace unanimity with QMV, but it also officially introduced COD as the ordinary legislative procedure in the AFSJ.<sup>75</sup>

Today, both the Council and the EP co-decide after numerous readings and discussions upon a specific act of legislation, which thus entails demanding decision rules since both institutions need to reach consensus to adopt legislation. When renowned P-A (e.g. Hawkins et al. 2006), but also intergovernmentalist studies (Moravcsik 1993) were investigating decision rules and decision-making in the EU, the focus was directed towards the collective principal, i.e. the Council, and its unanimous voting rules. I seek to put to the test this ‘old’ assumption on the importance of specific decision rules, in order to understand how the ordinary legislative procedure and QMV have influenced and continue influencing the mandate of agencies in the contemporary EU.

For the elaboration of the second proposition, I took further into account the already outlined theoretical considerations on the distinction between delegation and pooling within the notion of authority advanced by Hooghe and Marks (2015). Similarly to the widespread P-A assumptions, the authors assume that if majoritarian voting rules are in place, *pooling* is more likely and consequently, MS (the primary principals) are more prone to a centralisation of authority; conversely, if unanimous voting rules are in place, the pooling of authority among MS is less likely and delegation to institutional bodies is more likely to be favoured. Primary principals thus seek to avoid the risk of being outvoted or overruled by the other counterparts. In this processes, national representatives are affected by the “potential gains from cooperation” as well as by the transaction cost reduction that comes with supranational decision-making. Against this scenario, “the level of uncertainty” derives from the fact whether the decision is delegated or pooled, and from the “level of political risk for individual governments” (Kassim and Menon 2003, 127).<sup>76</sup>

Accordingly, my second assumption is that very demanding decision rules – entailing that more than one supranational institution is involved in the decision-making process and that some of these institutional actors can exercise their veto – allow the multiple agents to push for a significant

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<sup>75</sup> The co-decision legislative procedure was first introduced in 1991 with the Treaty of Maastricht (Treaty on European Union). Today, the procedure finds its legal basis in Article 289 and 294 TFEU and is referred to as the ‘ordinary legislative procedure’, thus becoming the main decision-making procedure used for adopting EU legislation. According to this procedure, the EP and the Council jointly adopt, i.e. co-decide, legislation by reaching a mutual consensus. Thus the EP shares legislative authority with the Council and its legislative power has accordingly been strengthened (Council of the European Union 2018c).

<sup>76</sup> In Moravcsik’s (1993) words, the (back then) EC differed from all other forms of international regimes because it pooled national sovereignty and delegated sovereign powers to semi-autonomous institutions.

empowerment given specific scope conditions. I further claim that by doing so, the multiple agents are not acting against the interests of their principals, but seek to reach the objective for which they were delegated powers in the first place, namely to achieve more integration at the EU level. Hence, I do not hypothesise agency slack.<sup>77</sup> The delegation contract envisages an increased co-operation among primary principals, i.e. the MS, as one of the major benefits of delegating authority from the national to the supranational level. By pushing for an expanded mandate and institutional reform of agencies, the multiple agents are technically not following their own interests, but the overall interest of the EU, i.e. more co-operation at the supranational level. In the case of demanding, unanimous decision rules, reaching a conclusive decision by pooling authority is less probable and delegation to other institutional bodies becomes the favourable solution.

Against these classic P-A premises, the dissertation considers the co-decision procedure as a new form of ‘unanimous’ decision rules, since both the Council and the EP need to agree upon new legislation. The Parliament has, according to the current ordinary legislative procedure, the power to block proposed legislation if it cannot agree with the Council, which makes the overall decision making process more ‘demanding’. Before the Lisbon Treaty, the Council of ministers decided unanimously on matters related to border control and the Schengen area. Back then, the EP had little power, whereas currently it is a co-legislator by all means with “full veto powers” (Thielemann and Zaun 2018, 909). Consequently, new veto players have been introduced into the EU decision-making process. The Lisbon Treaty has *de jure* empowered supranational institutions by strengthening their competencies in the AFSJ and creating specific conditions to which decisional actors need to adapt, in order to find ‘inter-institutional majorities’. Conversely to existing studies, which argue that despite the changes introduced by the Lisbon Treaty, “the previously leading actors”, namely MS in the JHA Council, still prevail over the newly empowered institutions in order to reach solutions close to the existing *status quo* (Trauner and Ripoll Servent 2016, 1420), I maintain that the changed decisional rules have allowed for institutional change to occur nevertheless.

Testing the second proposition, as formulated in the following, should hence allow to understand how the combination of COD followed by the Council and the EP, and the need for swift, conclusive decisions given specific scope conditions, is likely to create the room for multiple agents to push for significant agency empowerment.

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<sup>77</sup> Scholars have referred to this notion as to the “agents’ ability to act independently of their principals and thus to overreach their delegated authority” (da Conceicao-Heldt 2013, 22).

*Proposition 2: When unanimous decision rules are in place among intermediate principals, significant agency empowerment is more likely to occur through the initiative of multiple agents.*

Both outlined propositions shift the focus to the role of all three supranational intermediate principals, namely the Council, the EP and the Commission. Contrary to previous studies, by testing these propositions the positions of the multiple agents, i.e. the Commission *and* the agencies, involved in the decision-making process and their corresponding actions are also taken into account.

The identified causal mechanism, originating from the occurrence of the crisis, depends not only on the principals' characteristics – which are operationalised along the positions of the primary principals and the decision-making rules among the intermediate ones (reflecting the peculiar EU structure) –, but also on the activities undertaken by the multiple agents to achieve a certain outcome. According to this study, the multiple agents are expected to be the drivers of significant agency empowerment by convincing primary as well as intermediate principals to reform existing EU agencies. The third proposition focuses on the *scope conditions* of the mechanism. It anticipates that significant agency empowerment is more likely to occur within a policy area where competences are shared and where the relevance of the agency has grown in the primary principals' perception, because of the agency's intensifying activity and increasing experience over the years.

*Proposition 3: A significant agency empowerment is more likely to occur within a sub-policy where competences between the national and the supranational level are shared and where primary principals are consequently more dependent during a crisis on the agent's activity.*

Both the specifics of the policy area in question and the assistance provided by the agency over the years (especially in times of crisis) to the primary principals by enhancing supranational co-operation, affect the ultimate outcome of interest. The third proposition expects the EU's institutional complexity, its context sensitivity as well as the consequent relevance of the agent's activity in the eyes of the primary principals to co-determine a significant agency empowerment. The relevance of the agency relates to its mentioned 'status' in the principals' view, a status that derives from the agency's past actions and expertise (see section 2.1).

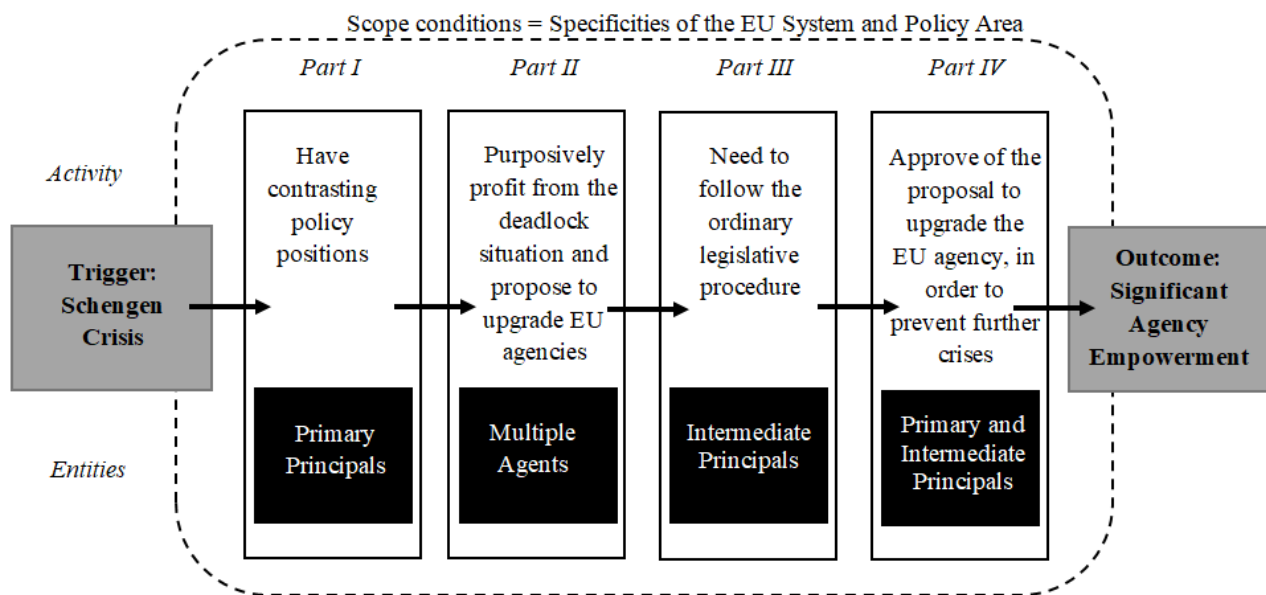
The primary and intermediate principals as well as the multiple agents are the entities of the mechanism that allegedly produce a change, i.e. a significant agency empowerment, by engaging in activities under specific scope conditions. Clarity is required on the kind of change that the analysis

seeks to explain: *the significant empowerment of EU migration agencies through the adoption of a new regulation substituting the establishing one*. Hence, an actor-centric approach needs to be adopted when looking at this institutional change.

As the literature on process tracing and causal mechanisms points out (e.g. Beach and Pedersen 2016a), the mechanism does not have to be linear, but the researcher has to demonstrate the productive continuity between the different stages of the mechanism. Since this analysis adopts a theory-testing single case study for each of the selected EU migration agencies, the understanding of the causal mechanism is generalizable within the specific context only.

Figure 3.3 shows the deductively theorised causal mechanism based on the propositions drawn from P-A studies and graphically translates the theoretical expectations presented so far “into case-specific predictions of what observable manifestations each of the parts of the mechanism should have if the mechanism is present in the case” (Beach and Pedersen 2013, 14).

Figure 3.3 *Hypothesised Causal Mechanism*



*Own elaboration.* Causal mechanism following Beach and Pedersen (2013), 59 and based on Moravcsik (1999)

The positions of the primary principals and the intermediate principals’ decision rules merge in the distinct parts of the mechanism. The causal mechanism shown in Figure 3.3 combines the main P-A assumptions and represents a tool to better comprehend the complex EU reality. The different parts of the theorised causal mechanism are triggered by the crisis. Crises have often been regarded as an opportunity for researchers to re-adjust existing theories, since crises are most likely to trigger interesting processes (Niemann and Speyer 2018).

The first part of the theorised mechanism involves conflicting positions among primary principals, i.e. the MS. Against this backdrop, it should be noted that the intermediate principals' positions at the supranational level do not necessarily have to reflect the positions of the primary principals (as shown in the upcoming Chapter 4 and Chapter 5). In the face of the crisis, the sharing of competences between the national and the supranational level within a specific policy area matters greatly and the principals' need for swift action and supranational support increases (Biermann et al. 2017, 10). Distinguishing between the primary principals and the intermediate ones, both present in the EU system, is relevant to demonstrate the principals' multi-layered character and the consequent inability to pool authority. In the second part of the theorised mechanism, since no agreement aggregating the diverging primary principals' positions can be reached although the crisis calls for a swift decision, multiple agents take action. Since the primary principals are not able to jointly find solutions to the crisis, the multiple agents (the Commission and the agencies) intentionally take advantage of the existing impasse and strategically put forward their positions, in order to achieve an extended mandate and hence more powers. This step is allegedly necessary to achieve a significant agency empowerment.

In the third part of the causal mechanism, the focus lies on the decision rules followed by the intermediate principals. Given the mixed nature of the principals' structure in the specific case involving EU agencies, this part of the causal mechanism has to be given particular attention to. The fact that the principals have to decide 'unanimously' and reach consensus due to the ordinary legislative procedure in place, theoretically creates a situation from which the multiple agents can profit. The possibility for other supranational EU institutions to exercise their veto powers (e.g. the EP) allows the multiple agents to ultimately push for significant agency empowerment. In the final fourth part of the mechanism, intermediate (and indirectly primary) principals adopt the regulation significantly empowering the agency, with the main intent of preventing future crises.

Testing causal mechanisms can be a tricky endeavour in the social sciences. Natural science academics would most probably claim that it is impossible to test causality when looking at social phenomena. Against this claim, Gerring (2010) offered an interesting gateway. Gerring (2010, 1499) stressed that "the more demanding goal of rigorously testing causal mechanisms in causal arguments is admirable but often unrealistic". The author argued that social scientists are more secure in their knowledge of covariational relationships than in their knowledge of the causal mechanisms at work in these relationships (ibid., 1516). Consequently, social science scholars feel stronger when making 'associational' arguments, rather than causal ones. Whereas it is usually easier for scholars to empirically measure (at least to some degree) X and Y, testing the mechanism between the two is often intractable. Gerring concluded that the researcher can only speculate on

mechanisms, but she can demonstrate “with a fair degree of assurance” covariations between X and Y. By claiming this, the author does not argue against causal mechanisms as a tool of analysis. Social scientists should not rigorously test causal mechanisms, but rather discuss plausible ones and “subject them to empirical testing *to the extent that this is feasible*” (ibid., 1518). Although some might argue that researchers should not mix causality and association, I believe that causality should not be tested as in the understanding of natural scientists. Keeping Gerring’s analysis in mind, social science scholars can still draw causal inferences about the different steps of the mechanism and thus study “within-case mechanistic evidence” (Beach 2017, 2). The purpose of this research is not to primarily enable generalisations, but rather to look at two distinct cases and at the different developments undergone by their respective acting entities.

The developed causal mechanism deducted from P-A theory might prove too simplistic when applied to the actual EU reality, while tracing the multiple P-A relations. When collecting empirical evidence, the parts of the ‘real’ mechanism might be different from the theorised ones. In order to test the theorised causal mechanism (*Figure 3.3*) for each of the selected cases, the study aims at tracing inductively the *actual* required steps for a significant agency empowerment to occur. The ambition is to unpack the single parts of the mechanism and to open up the traditional black box of any P-A relation between the act of delegation by the principal on one side and a substantial expansion of the agent’s mandate – in this study understood as significant agency empowerment – on the other (e.g. Reykers and Beach 2017). This attempt links to the suggestion made by Bonjour, Ripoll Servent, and Thielemann (2017, 7ff.), who invite researchers to open up the black box of power sharing in the EU with regard to migration policy processes. According to the authors, this entails paying more attention to “the institutional conditions under which policies are (re)formulated [...] and which actors and mechanisms drive or hinder policy emergence and change”.

For all parts of the mechanism the specific context is essential. Since a causal mechanism needs to be “contextually bounded”, the context comprehends all “the relevant aspects of a setting” (Falleti and Lynch 2009, 1143), with which the single parts of the mechanism interact and which correspond to the policy characteristics and the overall multi-layered EU system (Falleti and Lynch 2009; Reykers and Beach 2017). A specific control mechanism might hence be very effective in some contexts, whereas in others it has little if any effect (Reykers and Beach 2017, 256). Therefore, the peculiarities of the EU system especially with regard to the different levels of delegation and the specificities of the policy area have to be analysed in detail. Before moving on to the empirical analysis, I introduce the theorised scope conditions and relatedly offer a brief background analysis on the common EU migration policy.

### 3.2.2 Scope conditions: policy area and shared competences

Whereas the entities (i.e. the specific institutional actors involved) and their activities are understood as ‘independent variables’ in the causal mechanism, the overall institutional context within which these actions take place corresponds to the ‘scope conditions’ of the mechanism. These scope conditions have therefore also been defined as “contextual conditions” (Beach 2017, 9). Whereas the hypothesised trigger is the Schengen crisis, the scope conditions for the causal mechanism to occur correspond to the specifics of the policy area within which decisions need to be taken. The identified scope conditions are the specifics of the policy area in question, i.e. the sharing of competences between MS and EU institutions in that specific policy. These conditions altogether influence, according to the assumptions presented heretofore, the positions of primary and intermediate principals to outsource authority in a specific policy area.

The policy area within which the different institutional actors act, plays a major role when identifying P-A relations and it is therefore useful, for the purpose of the analysis, to take into account the ‘complexity’ of the policy realm in question. In the specific case of migration policy, I expect the complexity of the environment to be given by the specifics of the sub-policy in which the agency acts, which goes along with numerous challenges in times of crisis urging for co-ordinated and swift action. The occurrence of an external *event*, here understood as the *trigger*, thus matters greatly when defining possible outcomes of a P-A relation (Brandsma and Adriaensen 2017). The scope conditions for a significant agency empowerment to occur correspond to the outlined *sui generis* characteristics of the EU system and the specificities of the policy area within which the agency operates. The scope conditions are thus closely intertwined with the ‘shared’ competences between MS and the EU within that policy, and the importance of supranational operational co-operation in the relative area. In a policy area where competences are shared, the outbreak of a crisis determines the need for primary and intermediate principals to take swift decisions by common consent. Moreover, if competences are shared, primary principals are likely to be dependent on supranational bodies and their support.

A necessary element for significant agency empowerment to eventually occur is hence that the policy area in question has to be shared, meaning that national authorities and supranational EU institutions share competences in the decision-making process and have consequently increased operational co-operation over the years through the creation of independent institutional bodies, i.e. agencies. Against this backdrop, I argue that the mechanism between the identified trigger and outcome can only work if the specific policy area within which the agency acts is characterised by the sharing of authority between the involved national and supranational actors, which creates in



turn strong interdependencies between them. In the context of a crisis, principals usually tend to delegate more power to expert-driven agencies, which guarantee supranational support.<sup>78</sup> The national need for *European* operational co-operation goes along with the governments' need to collaborate more among themselves in a context of growing complexity and uncertainty. The interdependence between issue areas as well as between the national and the supranational level is tightening at a brisk pace. The EU system is such that there is no going back and MS have to increasingly rely on European bodies, where their national experts can share specific know-how and solve complex collective action problems (Parkes 2015, 63). This dissertation thus hypothesises that a *significant* agency empowerment is a function of both shared competences in a specific policy and related interdependencies between the national and the supranational level that result from growing operational co-operation (see also notion of “asymmetric interdependence” in Biermann et al. 2017). Moreover, P-A theorists claimed that “all else being equal, policy areas shrouded in uncertainty will tend to be delegated at higher rates” (Epstein and O’Halloran 1999, 197). ‘Higher rates’ can here be understood as the probability for more delegation in the sense of a *significant* agency empowerment when a policy area is characterised by shared competences between the national and the supranational level and when uncertainty reaches its peak, as for instance during a crisis.

To sum up, the Schengen crisis is the cause that allegedly triggered the significant agency empowerment. Such significant empowerment, leading to the adoption of a regulation establishing a completely new institutional structure, is an outcome stemming from additional independent variables, namely the diverging positions of the primary principals and the decision-rules in place at the EU level, which allow intermediate principals and multiple agents to affect the development of agencies in EU migration governance. The actions undertaken by both principals and agents are in turn linked to the policy area within which the specific agency acts. The policy area and its characteristics coincide with the scope conditions necessary for the theorised causal mechanism to actually take place.

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<sup>78</sup> This idea is also at the centre of studies exploring the role of epistemic communities. Farrell and Héritier (2005, 276) build upon Haas’ epistemic community concept and claim that “a high level of technical and expert knowledge, may play a role in accelerating regional integration, because scientific views tend to converge, and facilitate the formation of policy communities”.

### 3.3 The Common EU Migration Policy: A Brief Background Analysis

This section offers some empirical background information on the overall migration policy before moving to the empirical analysis of the two selected case studies, Frontex and EASO.

The development of the common EU asylum and migration policy can be broken down into three main phases. After the decision to abolish internal borders with the Schengen agreement in 1985 (supplemented by the Schengen Convention in 1990), EU MS soon realised the importance of a common approach to border management and migration related issues including asylum procedures. The rationale for free movement of people was economic (e.g. Geddes 2008). Co-operation among MS, i.e. the EU's primary principals, in the migration area was thus an inevitable consequence of the introduction of the Single European Market (Geddes and Scholten 2016, 147).

The Maastricht Treaty (1993) set the first milestone of such a co-operation process, when MS agreed on the necessity of a common asylum and immigration policy. Previously, all issues related to migration had fallen out of the EU competence. The policy area was then officially communitarised in a second phase by the 1999 Amsterdam Treaty, which integrated the Schengen *acquis* into Community Law as a protocol to the EC Treaty (Geddes 2008; HM Government - UK Government Home Office 2014; Stetter 2000). The policies related to the free movement of persons including those on asylum, immigration and external border control were consequently transferred from the third pillar to the first pillar<sup>79</sup> under the Community method.<sup>80</sup> Finally, with the entry into force of the Lisbon Treaty (2009), we assist to a third phase when EU competences in matters of migration were widened and the complicated three-pillar structure, which had impeded the further development of a common policy on migration (Guiraudon 2003), was finally abolished. The historical background of the harmonised EU immigration policy shows that over the last decades the competences of the EU in this realm have expanded substantially, although MS repeatedly tried to prevent a supranationalisation of migration issues (Givens and Luedtke 2004).

In order to identify the specific P-A relations between the different institutions and to understand who delegates to whom, it is fundamental to delimit the policy framework under focus and to clarify the division of competences between actors. The context in which the agent acts is extremely relevant to understand delegation and should be considered by the researcher as a necessary scope

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<sup>79</sup> Between 1993 and 2009, the Treaty of Maastricht introduced a new legal structure for the EU, the so-called three-pillar structure, which was eventually dismantled by the Treaty of Lisbon in 2009. The third pillar was named until 2003 Justice and Home Affairs (JHA). After 2003 its name was changed in Police and Judicial Co-operation in Criminal Matters (PJCC) bringing together co-operation in the fight against crime.

<sup>80</sup> The Community method refers today to the ordinary legislative procedure to adopt EU decisions as defined in Article 294 of the TFEU. Such method is characterised by 1) the sole right of the European Commission to initiate legislation; 2) the co-decision power between the Council and the EP, and 3) the use of qualified majority voting in Council.

condition (see also Delreux et al. 2012). Understanding the division of competences and the distribution of tasks between EU institutions in the specific sub-policies of asylum and external border control is a matter of major interest, in order to investigate delegation to further bodies such as agencies. Therefore, a preliminary description of the main actors and their role within the EU policy- and decision-making processes in EU migration policy is pivotal.

The EU has developed an expanding communitarised migration regime, within which the supranational institutions have been growingly involved (Niemann 2012). The primary aim when delegating powers to the supranational level and creating new institutional bodies (such as Frontex and EASO) is to enhance co-operation among MS within a contentious policy area as the one regarding migration. Political authority thus becomes *supranational* when decision-making takes place above the level of the nation-state or, in other words, when authority is shifted to the supranational level (Büthe 2016).

With regard to migration policies, the European Council played an important role by specifically paving the way for the future AFSJ through three strategic programmes (as mentioned in the introduction): the Tampere programme (1999-2004) held under the Finnish Council presidency; the Hague programme (2005-2009); and the Stockholm programme (2010-2014). These programmes gave the impetus for the communitarisation and hence supranationalisation of migration policy and set out ambitious objectives in order to develop co-operation in very sensitive political areas. The programmes further established fixed deadlines within which these objectives should be implemented.

In the valuable overview given by Lavenex (2014) on the changes introduced by the Treaty of Lisbon in the JHA realm, the relevance given in Article 3 TFEU to the goal of establishing an AFSJ is made evident by its prominent position in the text right after the first listed goal on the promotion of peace and economic well-being. For all matters that touch upon the AFSJ, the EU legislators act today according to the usual COD, which is characterised by two main elements, namely the co-decision of both the EP and the Council as well as QMV within the Council.<sup>81</sup>

The relation between EU MS and the Commission is laid down in Article 291 TFEU (on the implementing powers conferred on the Commission) and in Regulation (EU) No 182/2011. As far

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<sup>81</sup> Lavenex (2014) further highlighted that according to the Treaty signed in Lisbon, only four areas are excluded from the COD. These involve the area on passports, identity cards, residence permits or other similar documents (Article 77); the ones on family law (Article 81(3)) and operational police co-operation (Article 87(3)); and Article 86 on the potential establishment of a European public prosecutor's office from Eurojust. For all matters that are related to these areas, the Council shall act in accordance with a 'special legislative procedure', i.e. unanimously after consulting the EP.

as migration policy is concerned, the Commission *advises* and *examines*, by proposing new laws and regulation proposals. Up until now, the Commission's most relevant legacy in the realm of migration is the European Agenda on Migration of 2015, an instrument developed to respond to the surge in arrivals at the shores of the EU. This Agenda (COM(2015)240 final) was not only the direct response to the migration crisis, but also the result of 25 years of co-operation on migration and asylum (Geddes 2018, 122).

Besides the European Council, the Council and the Commission, the EP has played an increasingly relevant role in the common migration policy. On one side, the EP is the only directly elected institution and therefore the only *democratically* legitimate body. Although it has gained more power and authority over the years, especially after 2005 (Lopatin 2013), the European Commission and the Council, which are, conversely, indirectly accountable to voters, still fulfil a very influential role (cf. Moravcsik 2002). On the other side, the Commission and the EP have been described as “empowered actors” that lead to “harder, more Europeanised measures” (Parkes 2015, 53).

The role of the ECJ in the EU migration area has also evolved, becoming more powerful in particular with regard to the protection of immigrants' rights (Arcarazo and Geddes 2013; Garrett, Kelemen, and Schulz 1998). Its main role is to enforce “the law impartially by following the rules of precedent” (Garrett, Kelemen, and Schulz 1998, 174). Although the ECJ can act as a legislator through case law (cf. Wasserfallen 2010), its influence on the EU policy-making is rather indirect and limited in the sub-policies under focus, constrained by the power of other institutions. Hence, for the purpose of this research, the analysis will focus on the political legislative and executive bodies of the EU only and specifically on those institutions that are exercising (according to the theoretical assumptions presented in section 3.1) a *principal* role over EU migration agencies, i.e. Frontex and EASO. Furthermore, following Title V Chapter 2 of the TFEU the Council, the Commission and the EP are the main actors in charge of defining and implementing a common policy on border checks, asylum and immigration while the judiciary, i.e. the ECJ, is not directly addressed in the Treaty. Furthermore, the ECJ seems to be reluctant to ‘overpower’, afraid of losing “political legitimacy” in front of the EU MS (Givens and Luedtke 2004, 158; cf. also Garrett, Kelemen, and Schulz 1998).

The absence of internal border controls established by the Schengen Agreement in 1985 “should go hand in hand with the framing of a common policy on asylum, immigration and external border control, based on solidarity” between MS (COM(2016) 120 final, 2).

The broader EU immigration policy includes four main areas: (1) the internal free movement policy

within the EU; (2) the antidiscrimination policy; (3) the external border controls and visa policy; and (4) the asylum policy (Givens and Luedtke 2004). The asylum and border control (sub-)policies are areas where MS share competences with EU institutions, the latter playing an increasing role with regard to these matters. Accordingly, these two policies have been subject to a high Europeanisation process (Geddes 2008; Niemann 2012). The research scope of this study was consequently narrowed down to these two specific policy sectors only.

The following Table (*Table 3.1*) offers an overview of the distribution of responsibilities among EU institutions and the legal basis within each of the four migration policy areas. After the entering into force of the Maastricht Treaty, MS as the primary principals started transferring more political authority to the EU level, especially to the Council of Ministers. This transfer of power went further with the Amsterdam Treaty and later on with the Lisbon Treaty, when the EP gained a stronger role both in the decision-making process and in its control over the Commission (Bergman 2000). The Commission, on its behalf, was delegated the power to propose and oversee the implementation of EU decisions.

In sum, the Council usually reflects, due to its intergovernmental character, the positions of the MS as the primary principals of the EU system with regard to migration issues, whereas the Commission and the EP seem to favour a more liberal attitude in this realm (e.g. Bonjour, Ripoll Servent, and Thielemann 2017; Trauner and Ripoll Servent 2016; cf. Parkes 2015). The fast-paced development of the common migration policy during the last two decades has been accompanied by the mushrooming of agencies in charge of implementing the newly supranationalised sub-policies. During such process, the aegis and control mechanisms of the European Commission over these new bodies remained untouched.<sup>82</sup>

With the creation of migration agencies, MS had new fora in which they could co-operate. Each of the agencies' administrative board, i.e. its MB, is the specific venue where MS' and the Commission's representatives come together to take decisions on border control or asylum related matters.

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<sup>82</sup> However, in this regard the European Commission and the European Court of Auditors have had major difficulties in agreeing on a framework to regularly evaluate EU agencies (COM(2008) 135 final; European Court of Auditors 2016).

Table 3.1 *EU Migration Policy: Contemporary Competences of EU Institutions*

	<b>Internal free movement policy</b>	<b>Antidiscrimination policy</b>	<b>External border controls and visa policy</b>	<b>Asylum policy</b>
<b>European Commission</b>	<ul style="list-style-type: none"> <li>Proposes legislation (e.g. proposal Directive 2004/38/EC, which lays down the provisions governing the free movement of persons).</li> </ul>	<ul style="list-style-type: none"> <li>Specifically DG Justice and Consumers.</li> <li>Makes proposals for directives;</li> <li>Adopts strategies;</li> <li>Supports intermediary actors such as NGOs, social partners and equality bodies.</li> </ul>	<ul style="list-style-type: none"> <li><b>Proposes legislation</b> (specifically the DG Migration and Home Affairs – Directorate C2).</li> <li>Proposes genuine European Integrated Border Management, to meet the new challenges and political realities faced by the EU.</li> <li>Sets policy guidelines (e.g. EU Agenda on Migration).</li> <li>Presents recommendations.</li> <li>Publishes reports on the functioning of the Schengen area and State-of-play reports on the migration crisis (<i>evaluation function</i>).</li> </ul>	<ul style="list-style-type: none"> <li><b>Proposes legislation</b> (specifically the DG Migration and Home Affairs – Directorate C3).</li> <li>Sets policy guidelines (e.g. European Agenda on Migration).</li> <li>Issued the Green Paper on the creation of the future Common European Asylum System, CEAS, in 2007.</li> <li>Leading role in the preparation and negotiations of dialogues with third countries.</li> <li>Evaluates the impact of EASO on practical co-operation on asylum and on the CEAS (<i>evaluation function</i>).</li> </ul>
<b>Council (of the European Union)</b>	<ul style="list-style-type: none"> <li>The EP and the Council, acting in accordance with the COD, may adopt provisions with a view to facilitating the exercise of the right to move and reside freely within the territory of the MS.</li> </ul>	<ul style="list-style-type: none"> <li>The Council, acting unanimously after obtaining the consent of the EP, may take appropriate action to combat discrimination.</li> </ul>	<ul style="list-style-type: none"> <li>The EP and the Council shall adopt measures concerning the common policy on visa and other short-stay residence permits; the checks to which persons crossing external borders are subject; the conditions under which TCNs shall have the freedom to travel within the Union for a short period; <b>any measure necessary for the gradual establishment of an integrated system for external borders</b>; the absence of any control on persons, whatever their nationality, when crossing internal borders.</li> </ul>	<ul style="list-style-type: none"> <li>The EP and the Council shall adopt measures for a CEAS; a common system of temporary protection for displaced persons; common procedures for the granting of uniform asylum criteria and mechanisms for determining which MS is responsible for considering an application of asylum; standards concerning the conditions for the reception of applicants for asylum; partnership and co-operation with third countries.</li> <li>The EP’s Committee on Civil Liberties, Justice and Home Affairs develops recommendations.</li> </ul>
<b>European Parliament</b>				
<b>European Council</b>	<ul style="list-style-type: none"> <li>Defines the strategic guidelines for legislative and operational planning within the AFSJ.</li> <li>Adopts programmes with a far-reaching impact on the implementation of European asylum policy.</li> </ul>			
<b>Agencies</b>	—	<ul style="list-style-type: none"> <li><b>European Union Agency for Fundamental Rights (FRA)</b> and <b>European Institute for Gender Equality (EIGE)</b> collect and analyse information and data; provide assistance and expertise.</li> <li><b>Eurojust</b> promotes co-operation and co-ordination between the competent judicial authorities in the EU MS.</li> </ul>	<ul style="list-style-type: none"> <li><b>Frontex</b> promotes an integrated approach to border management; conducts risk analyses, draws up training curricula for border guards, and carries out research; co-ordinates joint border management operations and has the power to organise and implement return operations.</li> </ul>	<ul style="list-style-type: none"> <li><b>EASO</b> provides expertise and technical support to MS to help them implement the CEAS; ensures that individual asylum cases are dealt with in a coherent way by all MS.</li> </ul>
<b>CJEU</b>	<ul style="list-style-type: none"> <li>Influence through case law.</li> </ul>			
<b>Legal Basis</b>	Article 3(2) TEU; Article 21 TFEU; Titles IV and V TFEU.	Article 18 and 19 TFEU; Charter of Fundamental rights of the EU Title III Article 26.	Articles 67 and 77 TFEU.	Articles 67(2) and 78 of the TFEU; Article 18 of the EU Charter of Fundamental Rights.

*Own elaboration.* Source: (Faure, Gavas, and Knoll 2015)

In any migration related issue, supranational decisions have to undergo three distinct domains: a horizontal one (because both security and migration encompass different policy areas); a vertical one (co-ordination between the EU and its MS); and an institutional domain (across the EU's institutional web) (Wolff et al., 2009, p. 11). There are two main processes of delegation at the EU level (Franchino 2007). The first process, the *treaty delegation*, consists in MS (primary principals) delegating powers to supranational institutions, specifically the EU legislators i.e. the Council and the EP (intermediate principals). In its Communication of 2000 on a community immigration policy, the Commission stressed the relevance of EU bodies, especially the Council of the European Union and the EP, in shaping a common asylum and immigration policy. The Council is an essential decision-maker, exercising legislative power together with the EP and providing the mandate to the European Commission. Since the entry into force of the Lisbon Treaty (2009), the co-decision procedure – implying that the EP is on an equal footing with the Council in exercising legislative influence and making proposals, which have to be taken into account by the Council – has become the dominant legislative procedure in the EU (Börzel 2005). Articles 78 and 79 TFEU state that the QMV in the Council and co-decision by the Parliament are both to be applied to issues of asylum and migration (Andersson 2016, 39).

The second process of delegation occurs when the EU legislators delegate powers to *bureaucrats* i.e. the Commission. The theoretical contribution of this dissertation is to further explore these (secondary) delegation chains within the EU and between EU institutions themselves. As a result, a third delegation process can be outlined, namely the delegation process to EU migration agencies. Decentralised agencies have been defined as the most proliferating institutional entities in the EU (Busuioc 2012), independent of the European Commission and other European institutions (COM(2008) 135 final). Over the last decades, they have become essential participants in the EU policy-making and it is the aim of this study to shed light on their evolution and the political steps leading to their significantly extended mandate.

Before turning to the empirical analyses of Frontex and EASO, it is relevant to understand the relations between the EU multiple agents and specifically, why the European Commission generally chose 'agencies' as new implementing bodies supporting its executive work. At first, the Commission had informally delegated competences, which it was not able to carry out on its own due to the growing exceeding workload, to private third parties. However, such acts were soon criticised because of the underlying mismanagement, irregularities, and

legitimacy problems (Curtin 2005, 93).<sup>83</sup> Against this backdrop, when the European Commission realised that the Council would not grant it additional power, it concluded that the establishment of specialised European agencies would be the best solution to its problems (Kelemen 2002, 95). As a result, the Commission created a new formal system of delegation, which consisted in transferring powers to executive and regulatory agencies with their own legal personality.

While executive agencies are responsible for purely managerial tasks, simply assisting the Commission “in implementing the Community’s financial support programmes”, regulatory agencies “are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector” (COM(2002) 718 final, 3–4). Moreover, regulatory agencies exercise an executive function by enacting instruments, which contribute to regulating a specific sector and thus deal with activities that were originally a matter of the MS only (see Council of the European Union 2004f).

The intrinsic problematic issue that comes with the establishment of agencies and that law experts have complained about is that these new structures have no existence in any legal framework of the EU (e.g. Chiti 2009). The *Meroni* doctrine is the only legal instrument that ‘binds’ the delegation procedure to agencies by declaring that ‘outside bodies’ can only be delegated executive, i.e. implementing, powers.

The relation between the European Commission and EU agencies is defined in more detail in the mentioned Commission’s 2002 Communication on the operating framework for ERAs (COM(2002) 718 final), which in turn builds on the Commission’s White Paper on European Governance (COM(2001) 428 final). In the 2001 White Paper, the Commission had already envisaged the creation of new independent regulatory agencies, in order to improve the application of rules and policy across the EU. Some scholars have argued that the Commission has done so for self-interested reasons. It accepted the establishment of ERAs “when they aid its strategy to increase its own reach” and when enough control mechanisms over them are ensured, in order to defend the Commission’s existing powers (Thatcher 2011, 790). The Commission thus turns into a central actor of the delegation process since it does not only supervise the EU regulatory agencies, but also largely determines their design by proposing the corresponding legislation through the elaboration of draft regulations. The European Commission’s influence has grown along with the proliferation of agencies, which

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<sup>83</sup> For further information see Committee of Independent Experts, Second Report on “Reform of the Commission- Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud” Vol. II, (1999) – available online under <http://www.europarl.europa.eu/experts/pdf/rep2-2en.pdf> (last accessed on 12 October 2018).



have developed to be an indispensable information and support source of policy-makers, including the EU Executive.

An additional claim of this dissertation is that MS are usually driven by national, domestic forces, whereas intermediate principals at the EU institutional level push for the achievement of supranational goals. This claim does not entail that EU institutions necessarily have interests that are opposite to those of the MS, but rather that they try to direct national authorities towards 'EU-friendly' decision-making. There are also distinctions that need to be made among the EU institutions themselves. For instance, there seems to be a clear distinction between the more political and strategic interests of the Commission and the Council on one side, and the positions of the members of the European Parliament (MEPs) that are more likely to support the protection of human rights rather than the common borders of the EU on the other (see for instance European Parliament 2004).

The act of agency establishment is in itself the first act of any *agency empowerment* process: endowing an institutional body with specific tasks and capabilities within a specific issue scope represents the first necessary measure for 'empowerment' to eventually occur.

For a better understanding of the upcoming Chapter 4 and Chapter 5, it is essential to specify what a EU regulatory agency (sometimes also defined as 'decentralised agency') actually is and what the notion of EU 'agency' entails.

The basic features of any agency are the following: it is set up by an act of secondary legislation (usually a regulation); it has its own legal personality and receives financial contribution from the Community budget;<sup>84</sup> it is usually a permanent body with a seat in one of the MS; and finally, it has financial and administrative autonomy and is independent in the execution of its tasks. Besides these basic aspects, each agency then usually presents an executive core, its management board, in short MB, where national authorities coming from all EU MS are usually represented together with two representatives of the European Commission. The agency is then represented on the outside by an ED, who is usually appointed by the agency's board on a proposal of the Commission. The figure of the agency's ED is not only representative, but also strategic, since the ED takes part in the meetings of the

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<sup>84</sup> Based on a request of the EP (European Parliament 2007, 6), it was established that the definition of an 'agency' "would be determined by whether the body in question was set up pursuant to Article 185 of the Financial Regulation applicable to the general budget of the European Communities". All European agencies, which did not benefit from a Community subsidy, would consequently be excluded from being defined as such (European Union 2010).

ministers within the JHA Council and can come forward with strategic proposals.

Not all agencies of the EU however go officially by the name of ‘agency’. Some of these bodies are named ‘office’, ‘authority’, or ‘centre’ and it is this abundance of names that often creates confusion. Both Frontex and EASO, although they are named differently, since Frontex is explicitly an agency and EASO an office, fulfil the features listed above and are therefore both migration agencies falling under the DG HOME of the European Commission.

Despite the P-A theoretical approach providing the researcher with useful concepts, in existing P-A studies “most theorization is in the form of linking cause with effect” in terms of pinpointing mere correlations rather than making explicit how (and why) the outcome of interest is produced and thus only scratching the surface of causal processes. Seeking to answer Reykers and Beach’s (2017, 258ff.) call, the goal of this dissertation is “to dig deeper” and investigate how each step of the mechanism that links the cause to its outcome actually works. The differences and peculiarities of each agency, Frontex and EASO, as well as their distinct evolution are presented in Chapter 4 and Chapter 5, following the outlined theoretical framework and hypothesised causal mechanism.

For a matter of completeness, the conclusive Chapter 6 (specifically section 6.2) eventually outlines some alternative explanations of significant agency empowerment by deploying perspectives of historical institutionalism and EU integration theories in the attempt to offer some inspirational thoughts for future research.

## Chapter 4: Empowering the Border Agency Frontex

This chapter focuses on the significant empowerment of Frontex. It argues that two sets of factors were likely to determine the significant agency empowerment triggered by the Schengen crisis. The first set of factors relates to the positions being put forward by the agency's principals. As previously theorised (see Chapter 3), when primary principals' positions diverge leading to an impasse in the decision-making process, the multiple agents are expected to push for a significant agency empowerment. The sharing of competences in the sub-policy in question allows the agency to become over the years a vital mean of operational co-operation for primary principals. In the light of a crisis bearing uncertainty, which is inherent to migratory pressures, MS, i.e. the primary principals, are particularly dependent on the agent's activity and know-how. A second set of factors that allegedly determine significant agency empowerment are the decision rules framing the decision-making process at the EU level. The ordinary legislative procedure introduced in Lisbon in 2009 has changed the power relations between the three intermediate principals (namely the Council, the EP *and* the Commission), creating room to initiate institutional change through agency reform.

In order to gain insights into the different necessary steps for a significant expansion of Frontex's mandate to occur, I follow the single parts of the causal mechanism hypothesised above (sub-section 3.2.1) as well as P-A theoretical assumptions. After analysing Frontex's mandate in terms of the three empowerment components (tasks, issue scope and capabilities), the second part of the chapter engages with tracing the single parts of the theorised causal mechanism. Despite the contemporary literary outbreak on the EU and the Schengen crisis, an actual outline of the step-by-step evolution of Frontex's mandate and the mechanisms behind it is still missing. The empirical contribution of this dissertation is to close this gap and outline the development of the agency resulting in a significant agency empowerment in 2016.

In 2016, Frontex gained limited decision-making powers by participating in procedures that might ultimately lead to the adoption of binding decisions<sup>85</sup> or by issuing soft law (e.g. the EBCG's training competencies) (Scipioni 2017a). The information gathered by Frontex's experts in reports, risk analyses, and other official documents as well as the agency's growing work (for instance the co-ordinated activity together with EASO in the Greek and Italian

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<sup>85</sup> E.g. the binding nature of decisions taken by the EBCG's management board following a vulnerability assessment as enshrined in Article 13(8) of the Regulation (EU) 2016/1624 establishing the EBCG.

hotspots) clearly impact what is put on the agenda by the EU supranational agent, the European Commission, and eventually decided by the EU legislators. It also demonstrates the growing importance of supranational operational co-operation in the area of border control. Although Frontex is primarily in charge of implementing EU policies under its principals' control, the boost it experienced in 2016 suggests that there is more behind the border agency's activity. The significant empowerment of Frontex acting in a sensitive issue area as the one on border control entails the establishment of a new agency with growing tasks and capabilities as well as an expanded issue scope through the adoption of a new regulation. A significant agency empowerment thus corresponds to an *officially* expanded mandate: the growing *de facto* competencies gained by the agency over the years through its intensifying activity are hence institutionalised and legitimised by an official document expanding this body's remit substantially and substituting it with a new structure.

Against an 'ever-divided' Union rather than an 'ever-closer' one (as advocated in the Preamble of the Treaty of Rome in 1957), the strengthening process Frontex has undergone seems to be counterintuitive, since agencies are EU institutional bodies that stand for more co-operation and hence more integration at the supranational level. Outlining the development of Frontex can clarify the future of the *shared* border control sub-policy and shed light on the political and institutional actors shaping its integration. Frontex's role has grown over the years due to specific factors that are investigated in the upcoming section 4.2. The border agency's intensified fieldwork, growing know-how as well as its 2016 reform introducing a substantially expanded mandate, are changes that should not be left unnoticed.

The objective of this dissertation is to understand the details of institutional transformation at the EU level after the migration crisis. Although classic P-A theorists could argue that the here identified EU intermediate principals should be still regarded as agents of EU MS, the distinction between primary and intermediate principals on one side and multiple agents including EU migration agencies on the other can allow for a more accurate analysis. Executive, expert-driven institutional bodies like Frontex have the intrinsic advantage of affecting decision-making through the unique supranational assistance they can offer to their primary principals (Chou and Riddervold 2015). Therefore, the following analysis focuses not only on the development of the tasks, issue scope, financial and human resources of the border agency, but also on the implications that its significant mandate expansion might eventually have on the overall EU migration policy.

#### 4.1 Frontex's Mandate

Understanding Frontex's historical background is essential to trace the events that led to its significant empowerment of 2016. In the understanding of this dissertation, delegation and empowerment are not meant as synonymous, since the former is understood as part of the latter. This section outlines Frontex's mandate before and after its 2016 reform and conceptualises its main components in terms of tasks, capabilities and issue scope (as suggested by Heldt and Schmidtke (2017)). The ground-breaking change in the agency's history took place only after the Schengen crisis, which represents the trigger that is expected to lead to a *significant* empowerment of Frontex (more details on the crisis as the causal mechanism's trigger are presented in sub-section 4.2.1.2). After highlighting the changes in the border agency's mandate prior and after reform, the chapter moves to the explanatory factors of Frontex's significant empowerment in order to trace the hypothesised causal mechanism following the three propositions as presented above (sub-section 3.2.1). The history of the agency and its *raison d'être* need thus to be examined first against the changes introduced after the Schengen crisis, to subsequently trace the theorised causal mechanism.

The external border regime has always been a highly intergovernmental domain (Niemann and Speyer 2018). The predominance of national interests that leak from Frontex's establishing regulation testifies the intergovernmental approach to the EU 'Integrated Border Management' (IBM) (see also Carrera 2007) ever since the early 2000s. The development of the IBM<sup>86</sup> was concomitant to an advancing 'global approach to migration', which had been set in motion during the Tampere Council of 1999 and accelerated by the concurrent fight against terrorism. The IBM (partially) thus found its official setup in 2005 in the Global Approach to Migration and Mobility (GAMM), which, as an overarching framework, intended to define how the EU should conduct its policy dialogues and co-operation with non-EU countries, based on clearly defined priorities.<sup>87</sup>

In the specific case of Frontex, the interests of both primary and intermediate principals (MS and EU institutions) behind the establishment of the border agency were multiple, but

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<sup>86</sup> According to the 2006 Council's Conclusions on integrated border management, the IBM encompassed: (1) border control, including checks and surveillance as well as relevant risk analysis and crime intelligence; (2) detection and investigation of cross-border crime; (3) the "four-tier access control model", which involves activities in third countries, co-operation with neighbouring third countries, controls within the Schengen area and return operations; (4) inter-agency co-operation for border management and international co-operation; and (5) co-ordination and coherence of the activities of the MS and institutions as well as other bodies of the Community and the Union (Presidency of the Council 2006, 2).

<sup>87</sup> For further information on the GAMM, visit the DG HOME website presenting the main priorities of the approach available online under [https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en) (last accessed on 2.11.2018).

primarily linked to the political state of mind that prevailed right after the 9/11 terrorist attacks (for further details see also Parkes 2015).

The European Agency for the Management of Operational Cooperation at the External borders of the Member States of the European Union, in short Frontex, was established on 26 October 2004 under the consultation procedure<sup>88</sup> (not yet the co-decision procedure as enshrined in the Lisbon Treaty) with the adoption of the Council Regulation (EC) No 2007/2004. After the adoption of the 2004 regulation, the agency became operational on 1 May 2005, its seat being established in Warsaw. At that time, control, security, and surveillance were keywords with a heavy legacy rooted in the contemporary terrorist attacks. Moreover, in 2003 an alarming number of immigrants had both legally and illegally entered the EU 25, making MS aware of the urgent need for a common border control instrument.

When Frontex started its work in 2005, its early structure was built upon the experiences of the mentioned Common Unit and other operational as well as training centres that had specialised in the different aspects of control and surveillance of land, air, and maritime borders (Council of the European Union 2005a). The border agency had thus to take into account the experience gained by these *ad hoc* centres to further set up “specialised, decentralised branches in the respective Member States” (Council of the European Union 2003a, 10). The Common Unit’s Risk Analysis Centres had also laid the groundwork for one of Frontex’s main tasks, namely the carrying out of risk analyses. Accordingly, the establishing regulation affirmed the agency’s key role for an enhanced implementation of the IBM by primarily issuing risk analyses, which are at the heart of Frontex’s activity (see Ekelund 2014; Horii 2016).

With the establishment of Frontex in 2004, its intermediate principals, in particular the European Commission and the Council, emphasised control and surveillance issues within the larger framework of the envisaged IBM (Jeandesboz 2008, 3). As a result, the mandate of Frontex envisaged both the improvement of the IBM as well as the achievement of a more effective application of Community measures relating to the management of external borders. In line with this overall objective, Frontex’s main tasks (details on the agency’s tasks and their development follow in sub-section 4.1.1) included the elaboration of risk analyses in order to eventually carry out JOs or joint return operations (JROs). The provision of general

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<sup>88</sup> Before the SEA (1986), the consultation procedure was the most used procedure in the EC. According to the consultation procedure, the Council has to take into account the EP’s opinion, but is not bound by the Parliament’s position. It has just an obligation to consult it. After the Treaty of Lisbon, the co-decision procedure or ordinary legislative procedure became the main legislative procedure and was extended to almost all policy areas. Today, Article 289 of the TFEU establishes that the consultation procedure is a special legislative procedure, as a form of exception to the ordinary legislative procedure (the latter enshrined in Article 294).

as well as tailored risk analyses<sup>89</sup> in the realm of border control and the implementation of the Common Integrated Risk Analysis Model (CIRAM) incorporated in the Common Core Curriculum (CCC) for border guards basic training have remained, over the years, Frontex's main activities. These two instruments are entrenched in the agency's unique know-how and represent the basis for the work of the Risk Analysis Unit (RAU)<sup>90</sup> when planning a JO.

Initially, the Council and the European Commission as the two intermediate principals had been given the high ground in monitoring the agency's activity compared to the other intermediate principal, the EP. Given the Parliament's limited involvement, members of the national parliaments started soon to stress that the EP should be added to the list of those institutions overseeing Frontex's work (House of Lords: European Union Committee 2008, 26). This is yet again a demonstration of the restricted influence the EP had over Frontex in the first period of the agency's mandate and before the introduction of the ordinary legislative procedure (more details follow in section 4.2).

In 2007 and 2011, relatively minor amendments to Frontex's mandate were introduced and should have theoretically prevented the impasse situation that the EU faced in 2015-16, while millions of refugees were irregularly crossing the EU maritime and territorial borders. The fact that EU institutions in general and Frontex in particular failed to efficiently contain the crisis, demanded for a more significant change of the border agency's mandate than those that had been previously undertaken.

Although Frontex's 2011 amendment to its establishing regulation through Regulation (EU) No 1168/2011 cannot be defined as a phenomenon of significant empowerment, it was nevertheless a milestone in the direction of such an outcome. Compared to 2006<sup>91</sup>, in 2011 Frontex had already acquired a budget that was more than ten times higher as well as an overall staff almost ten times more numerous than at the beginning of its activity (for the agency's resources see sub-section 4.1.2). The availability of increased resources was nonetheless not the most incisive of changes. The main change introduced by the 2011

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<sup>89</sup> Besides the risk analyses issued by Frontex each year, every MS issues its own risk analysis too.

<sup>90</sup> The Unit's task is to produce "appropriate accurate and timely intelligence products", which are the starting point for Frontex' operational activities, as well as to keep "all principal customers informed of the current illegal immigration situation at the external borders" (House of Lords: European Union Committee 2008, 26).

<sup>91</sup> Before 2006, the necessary documents for all staff and other administrative expenditures were prepared at Frontex's headquarters, but only authorised by one of the authorising officers working for the former Commission's DG responsible for Justice, Liberty and Security in Brussels. The distance between Brussels and Warsaw "slowed down many processes considerably so the Commission and Frontex did their utmost to end this situation as soon as possible. As a result of these efforts, Frontex was granted financial independence from 1 October 2006" (Frontex 2006, 20–21).

amendment was the inclusion of a fundamental rights strategy, which from that moment onwards a fundamental rights officer (FRO) and a consultative forum should safeguard. Consequently, the consultative forum would have an assisting role to Frontex's ED and MB in fundamental rights matters and the agency would have to invite EASO, the FRA, the United Nations High Commissioner for Refugees (UNHCR) and other relevant organisations to participate in the consultative forum (Article 26(a)(2) of the amended regulation).

When the migration crisis broke out between late 2014 and the beginning of 2015, the situation called for subsequent meetings among Frontex's primary principals within the official EU fora, in order to tackle the emerging migration and asylum challenges. Against this backdrop, the role and activity of supranational bodies as Frontex were at the core of most discussions. In 2016 the real extraordinary structure-changing reform of Frontex took place, five years after the 2011 amendments, as a clear break with the past. The *de facto* changing environment the border agency was working in called for such a change.

The agency has improved its different competencies over the years, which extend nowadays from carrying out risk analyses and border guard training to assessing the capacity as well as readiness of MS to face upcoming challenges. The agency's reform thus presented multiple important features, which can be primarily reduced to two. First, the new EBCG's political importance, because of "self-evident" reasons, namely the strengthening of a EU body in a politically sensitive issue area; second, the fact that MS were very careful in reinforcing border management without allowing the agency to "take over completely". Border management is "not yet a true and pure task of the agency", since competences between the national and the supranational level remain shared (Interview with Frontex Expert 2 2018). In the end, each decision regarding a reform of the agency has a political nature and the agency cannot impose co-operation. Nevertheless, Frontex's remit has incredibly expanded, *inter alia because* of the shared competences in its sub-policy and the parallel dependence of MS on Frontex's activity and assistance, as I argue in section 4.2.

The expanded mandate of Frontex needed to go along with a 'healthy' growth of resources. At the same time, regulatory agencies as the EBCG should not become "little empires in themselves", since they ought to respect the limit of their mandate (*ibid.*). Keeping the balance between a strengthened European body on one side and the sovereignty of primary principals on the other, is one of the many challenging tasks that the Commission committed to as a supranational agent.

One of the major strengths of any agency is its specialisation. The agency's staff



composition foresees not only personnel aggregations such as pools, teams and a MB managing both the agency's budget as well as inner decision-making, but also single personalities representing the agency on the outside, such as the figure of the ED. The MB as the agency's administrative board should deal with the adoption of the agency's work programmes and rules of procedure, while playing a central role in the adoption of its finances. Accordingly, the MB approves Frontex's budget, appoints the ED and is in charge of the effective functioning of the agency. The ED is a senior official, who has an administrative and sometimes also a more strategic role rather than a decisional one. The real decisional power of the agency lies instead within the MB, a forum where the agency comes together with its *primary* and *intermediate* principals' representatives, namely the MS' border guard authorities, acting under the umbrella of the EBCG (e.g. Rijpma 2016), and the European Commission. The border agency's MB thus represents a balance between the intergovernmental and the supranational level, since it is composed of 26 MS' representatives, which are signatories to the Schengen *acquis*, plus two members of the Commission. Representatives from the UK and Ireland are invited to participate in the MB's meetings, whereas Norway, Iceland, Lichtenstein, and Switzerland (which are not EU MS, but nevertheless associated with the implementation, application and development of the Schengen *acquis*) also participate in the agency's MB meetings "albeit with limited voting rights" (recital 23 of Frontex's Regulation of 2004; Frontex 2018a).<sup>92</sup> The MB's members, which are appointed by the MS, are selected based on their high-level relevant experience and expertise in the field of operational co-operation on border management and return (Article 21(2) of Frontex's regulation of 2004 and later Article 63(2) of Frontex's regulation of 2016).

In 2016, the proposal presented by the Commission for a new EBCG was approved by all MS, although of course with several amendments to the Commission's original draft. Before outlining the 'empowerment' of Frontex, i.e. the development of the agency's tasks, resources and scope, in order to move then to the changes introduced by the 2016 reform, which are interpreted in this study as a 'significant empowerment', a further remark should be made. The 2015-16 crisis provided new evidence about the political character of Frontex's missions from the outset (e.g. operation Sophia,<sup>93</sup> which was launched after the April 2015 migrant shipwrecks coming from Libya). The agency's operation are highly political and can only be

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<sup>92</sup> The establishing regulation specified moreover that board members would serve for four years, a term of office that could be renewed only once according to Article 21(21).

<sup>93</sup> For details about this operation see the article of EUobserver available online under <https://euobserver.com/opinion/142565> (last accessed on 28.08.2018).

established with the consensus of all primary principals. For this very same reason, the new EBCG is not seen by officials as representing Frontex only, but it is understood as the agency *plus* the MS' authorities (Interview with Frontex Expert 3 2018). Nonetheless, a pivotal change introduced by the 2016 regulation was the idea of a 'shared responsibility'. The 2016 regulation states that the European IBM should be implemented "as a shared responsibility of the Agency and the national authorities responsible for border management" (recital 5). For the first time, an official regulation clearly states that the management of the external borders is a shared responsibility of the EU *and* the MS. This was a consequence of the agency becoming "an even closer partner for the Member States" for example through strengthened co-operation through JOs as well as returns over the years (Frontex European Border and Coast Guard Agency 2018, 8). This is additional evidence of the solidification and advancement in the sharing of competences between the national and the supranational level. At the same time, while the 2016 regulation still reserves executive enforcement powers to the MS, the introduction of a shared responsibility concept "in the absence of shared accountability" increased existing concerns within the EP (Rijpma 2016). Frontex was previously in charge of merely 'supporting' MS in the implementation of the IBM (as initially enshrined in recital 5 of Frontex's establishing regulation). By defining the IBM concept<sup>94</sup> in a comprehensive way (Article 4), the new 2016 regulation bestowed increasing tasks, issue scope and capabilities on the new EBCG, all components that are analysed in the following.

#### **4.1.1 Frontex's Tasks**

Ever since its establishment in 2004, the tasks of the border agency have evolved. In the 2016 regulation, a whole chapter (Chapter II), and not just few, scattered articles as in the previous regulations (Article 2 in the establishing regulation of 2004 and its amendment in the regulation of 2011), is dedicated to the definition of the agency's tasks. The 2016 regulation accordingly presents the new comprehensive tasks of the EBCG (Article 6 and 8) as well as a new article on the border agency's accountability (Article 7), the latter stating that Frontex is accountable to both its intermediate principals, the European Parliament *and* the Council. Article 8 then summarises all the tasks that Frontex has to fulfil, which are further regulated in detail in the following articles (e.g. Article 11 on monitoring migratory flows and carrying out risk analyses as well as Article 13 on the highly debated vulnerability assessment task).

The most important tasks of Frontex have always been the monitoring of migration flows

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<sup>94</sup> Article 2 of Frontex's regulation of 2016 is essential for elucidation on further specific concepts, since it comprises and sums up all the definitions of relevant concepts, such as hotspot area, host member state, etc.

and the carrying out of risk analyses (Article 11 of the 2016 regulation). According to Frontex's standard procedure, risk analyses need to be forwarded to all intermediate principals and represent the basis for any JO. The corresponding Frontex's sea, land or air unit coordinates the operation, after having gathered further information. At the end of each operation, the border agency prepares a related evaluation report presenting the achieved results as well as the possible shortcomings and problems, which might have come up during the operation.

As stated in an external evaluation carried out in 2015 (Ramboll Management Consulting and Eurasyllum Ltd 2015, 22),<sup>95</sup> the overall development of the agency Frontex starting from 2011 has been remarkable "in terms of its mandate, activities and financial and human resources". When looking at the changes introduced by the 2016 regulation establishing the EBCG, this trend reached an unprecedented significant peak. Among the most prominent changes introduced in 2016 are Frontex's greater role in returning migrants to their country of origin<sup>96</sup> and the expansion of the scope of activities it is able to carry out. *Table 4.1* offers an overview of this task evolution by summarising the agency's main tasks as enshrined in the establishing regulation of 2004 (first column); their amendments as introduced by the amending regulation of 2011 (second column); and the comprehensive reformed tasks as established in the regulation of 2016 (third column).

Among all the changes introduced in 2016, the most disputed one was the EBCG's new 'right to intervene' (more details on the discussions among principals on this issue follow in the explanatory section 4.2). In order for the reformed border agency to intervene at an early stage in emergency situations at the external borders of the EU, the European Commission had foreseen in its 2015 proposal that the agency could intervene in a MS upon an implementing decision of the Commission. The agency's intervention in case of situations requiring urgent action in a MS would only take place if the concerned MS was not to take "necessary corrective action in line with the vulnerability assessment or in the event of disproportionate migratory pressure at the external borders" (COM(2015) 671 final, 10). Against such situation and in order to prevent a future crisis, the Commission would take a decision identifying specific measures to be implemented by the EBCG and requiring the MS to collaborate with the agency in order to protect the functioning of the Schengen area.

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<sup>95</sup> According to Article 33 of Frontex's establishing regulation, three years after the agency had taken up its responsibilities and "every five years thereafter", the MB has to commission an independent external evaluation. The evaluation examines how effectively Frontex fulfils its mandate.

<sup>96</sup> In the case of return, Frontex can however only act upon executing decisions, which need to be taken by national authorities.

Table 4.1 *Frontex's Tasks' Evolution*

Council Regulation (EC) No 2007/2004	Regulation (EU) No 1168/2011 of the European Parliament and of the Council	Regulation (EU) 2016/1624 of the European Parliament and of the Council
1. Co-ordinate operational co-operation between MS in the field of management of external borders. (Art. 2(1)(a); Art. 3); the Agency is tasked with the co-ordination of JOs of MS.	1. Develop an Operational Plan (OP) in co-operation with the host MS for the JO (Art. 3a (1) (a-k)); nominate a co-ordinating officer for JOs (Art. 3b(5)); support the development of a Code of Conduct for JROs (Art. 2a).	1. In emergency situations ability to quickly deploy border and coast guard officers from the <i>rapid reaction pool</i> (which should be a minimum of 1,500 officers. [...]); carry out a <i>vulnerability assessment</i> including the assessment of the capacity and readiness of MS to face threats and challenges at the external borders (Art. 8(b)); <i>deploy liaison officers</i> not only to monitor and co-ordinate with third countries, but also <i>to monitor EU MS</i> .
2. Assist MS on training of national border guards, including the establishment of common training standards (Art.2(1)(b); Art. 5).	2. Staff and European Border Guard Teams (EBGT) need to receive training regarding EU and international law and fundamental rights; develop CCC for the training of border guards and monitor implementation; establish an exchange programme for border guards to work with colleagues in another MS (Art. 5).	2. Assist MS on training of national border guards, other relevant staff and <i>experts on return</i> , including the establishment of common training standards; (Art. 8(1)(p)).
3. Carry out risk analyses; develop a CIRAM and design tailored risk analyses (Art. 2(1)(c); Art. 4).	3. Carry out risk analyses, including the assessment of the capacity of MS to face threats and pressures at the external borders; develop information systems that enable swift and reliable exchange of information regarding emerging risks at the external borders (Art. 2(c) and (h)).	3. Carry out risk analyses and the <i>monitoring of migratory flows</i> , which are closely related to the <i>vulnerability assessments</i> on MS; establish a CIRAM by a decision of the MB and on a proposal of the ED; the risk analysis is not distinguished anymore into general and tailored; every risk analysis has to be submitted to <i>the European Parliament</i> , to the Council, and to the Commission (Art. 11(2)); MS shall take the results of the risk analysis into account when planning their activities at the external borders and their activities with regard to return (Art. 11(6)).
4. Follow up on the development of research relevant for the control and the surveillance of the external borders and disseminate this information to the Commission and the Member States. (Art. 2(1) d, Art. 6).	4. Participate in the development of research relevant for the control and surveillance of the external borders (Art. 6); assist MS in circumstances requiring increased technical and operational assistance at the external borders, taking into account that some situations may involve humanitarian emergencies and rescue at sea (Art. 2(1)(d)).	4. Proactively monitor and contribute to research and innovation activities relevant for European IBM; <i>disseminate the results of that research to the EP, the MS and the Commission</i> (Art. 37(1)); assist the MS and the Commission in identifying key research themes (Art. 37(2)); implement the parts of the Framework Programme for Research and Integration relating to border security (Art. 37(3)).
5. Assist MS in circumstances requiring increased technical and operational assistance at the external borders and maintain a centralised record of the technical equipment of MS (Art. 2(1)(d); Art. 7, Art. 8).	5. Assist MS in circumstances requiring increased technical and operational assistance, especially those MS facing specific and disproportionate pressures; set up the EBGT that are to be deployed during JOs, pilot projects and rapid interventions (Art. 8).	5. Possibility to acquire, either on its own or as co-owner with a MS, or lease technical equipment to be deployed during JOs, pilot projects, rapid border interventions, return operations, return interventions (Art. 38(1)); <i>equipment</i> solely owned by the Agency <i>shall be fully available for deployment at any time</i> (Art. 39(2)); the technical equipment pool shall include a <i>rapid reaction equipment pool</i> containing a limited number of items needed for possible rapid border interventions (Art.39(7)).

6. Provide MS with the necessary support in organising joint return operations (Art. 2(1)(f); Art. 9).	6. Provide MS with the necessary support, including, upon request, co-ordination or organisation of JROs.	6. Assist Member States in circumstances requiring increased technical and operational assistance to implement the obligation to return returnees, including through the co-ordination or organisation of return operations (Art.8(k)); <b>new pool of forced-return monitors</b> is established (Art.29); rapid return interventions are foreseen (Art.33).
–	7. Develop a Fundamental Rights Strategy and its implementation, as well as monitor and put in place an effective mechanism to monitor the respect for fundamental rights in all the activities of the Agency. A Consultative Forum shall be established by the Agency to assist the Executive Director and the Management Board in fundamental rights matters. A Fundamental Rights Officer shall be designated by the Management Board to contribute to the mechanism for monitoring fundamental rights (Art. 26a (2) and (3)).	7. The extended tasks and competence of Frontex should be balanced with strengthened fundamental rights safeguards and increased accountability (recital 14); provide its FRO with adequate resources and staff corresponding to its mandate and size (recital 48); the Commission, in co-operation with the other relevant agencies, should ensure the compliance of activities in the <b>hotspot areas</b> with the relevant Union <i>acquis</i> , including the CEAS and fundamental rights (especially when it comes to return operations) (recital 27); the Regulation should further establish a <b>complaints mechanism</b> to safeguard the respect for fundamental rights in all the activities of the agency (recital 50); the consultative forum of the agency shall be consulted on the establishment of a complaints mechanism (Art.70(3)).
8. Facilitate operational co-operation with third countries and co-operation with competent authorities of third countries (Art. 14).	8. Facilitate operational co-ordination with third countries and co-operation with competent authorities in third countries, including the possibility to deploy liaison officers in third countries and the possibility to provide technical assistance (Art. 14).	8. <b>Co-operation with third countries is a key component of European IBM</b> , focusing in particular on neighbouring countries and on those third countries which have been identified through risk analysis as being countries of origin and/or transit for illegal immigration; assist MS and third countries in the context of technical and operational co-operation; <b>co-operation with third countries with regard to return operations should also be strengthened <i>inter alia</i></b> by providing practical information on third countries of return in co-operation, where appropriate, with other Union bodies, offices and agencies, including EASO; inform the <b>EP on activities conducted in and with third countries</b> and possibility to continue to deploy experts from its own staff as liaison officers in third countries (Art. 4(f); Art. 8(1)(f)(u); Art. 27(1)(a) and 27(2)(b); Art. 54 and 55).

*Own elaboration.* Source: (Regulation No. 2007/2004; Regulation (EU) No. 1168/2011; Regulation (EU) 2016/1624; Ramboll Management Consulting and Eurasyllum Ltd 2015)

The reform of 2016 has thus given Frontex the unprecedented task to evaluate the security capacity of EU members, a task that in the words of the agency's ED corresponds to "a vital common interest" (Leggeri 2018).<sup>97</sup>

Activities to guarantee the successful return of illegal residents have also always been part of the agency's activity, given that return management is an intrinsic part of a comprehensive approach to migration issues. Frontex has accordingly to provide its primary principals with the necessary assistance for the organisation of JROs. It also was and still is the responsibility of the agency to identify best practices for the removal of TCNs illegally residing in the EU territory. Since the 2016 reform, Frontex's mandate on return includes the right to organise and finance JROs.

In addition to the official tasks delegated to Frontex first through the mentioned regulation of 2004 and its amendment of 2011, and then through the EBCG regulation of 2016, the activity of the agency envisages the performance of further tasks stipulated in five separate regulations. The first of these regulations is the one that established the European Border Surveillance System Eurosur in 2013<sup>98</sup> foreseeing a concomitant strengthened role of Frontex in the fight against border crime.

The second is Regulation (EU) 1053/2013, which involves the agency in the evaluation and monitoring of MS when implementing the Schengen *acquis*,<sup>99</sup> whereas the Schengen Borders Code<sup>100</sup> regulates the temporary reintroduction of internal border controls (Regulation (EU) 2016/399 Article 26 and following). According to the former, the European Commission should consult Frontex and request its technical and operational assistance, for instance to those MS that temporarily reintroduced internal border controls. Moreover, Frontex supports the implementation of the evaluation mechanism through its expertise and its risk analyses relatedly play also a pivotal role (Article 7 of Regulation (EU) 1053/2013).

In 2014, the EP and the Council approved another regulation establishing the instrument

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<sup>97</sup> During his key speech at the 2018 Warsaw Security Forum, Frontex's ED Fabrice Leggeri claimed that the agency "[had] become a cornerstone of the EU to guarantee an area of freedom and justice" (Leggeri 2018).

<sup>98</sup> Regulation (EU) No 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System, OJ L295/ 11, 6.11.2013.

<sup>99</sup> Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L295, 6.11.2013.

<sup>100</sup> The Schengen Borders Code was adopted in March 2006 through Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, i.e. the Schengen Borders Code. The 2006 Regulation (EC) No 562/2006 was then repealed and replaced in March 2016 by Regulation (EU) 2016/399 (European Parliament and Council 2016).

for financial support for external borders and visa as part of the ISF.<sup>101</sup> The established instrument should reinforce the activities undertaken by Frontex while the European Commission should, once again, consult the border agency on the draft national programmes submitted by MS within the instrument's framework.

Finally, the 2014 regulation establishing rules on the surveillance of external sea<sup>102</sup> stipulates that Frontex has, on the condition that the fundamental rights of the TCNs are respected, the possibility to disembark TCNs in a third country in the context of planning of a sea operation. Additionally, the border agency can exchange personal data obtained during a sea operation regarding intercepted or rescued persons with third countries *without* breaching the principle of *non-refoulement*<sup>103</sup> and respecting the rules applicable to search and rescue (SAR) operations (Ramboll Management Consulting and Eurasyllum Ltd 2015, 21–22). The close link between the border agency's activity and expertise on one side and decisions taken by its intermediate principals on the other, on matters as the ones regarding monitoring of the Schengen *acquis*' correct implementation, is additionally revealed in these regulations. The European Commission in particular 'shall' consult with the agency on numerous issues before taking further steps.

Another fundamental and unprecedented novelty for the agency's activity starting from 2015 was Frontex's support to national authorities in the identification and registration of migrants at the *hotspot areas*. Following the new hotspot approach to managing exceptional migratory flows, the border agency (together with EASO) sends teams of experts to the hotspot areas in the host MS.<sup>104</sup>

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<sup>101</sup> Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC, OJ L150, 20.5.2014.

<sup>102</sup> Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational co-operation co-ordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L189, 27.6.2014.

<sup>103</sup> This principle is a fundamental principle of customary international law enshrined in Article 33 of the 1951 Geneva Convention relating to the status of refugees. Since the principle constitutes customary international law, also countries that are not signatories to the Convention or its 1967 Protocol shall comply with it. However, whether the principle should be considered *ius cogens* and thus be applicable to all countries – even the non-signatory ones – is still a highly debated topic. The principle forbids any country that receives asylum seekers from returning them to a country in which they would be in likely danger of persecution based on 'race, religion, nationality, membership of a particular social group or political opinion'.

<sup>104</sup> These experts are grouped within migration management 'support teams' that are deployed by other EU MS and that can only work in partnership with national authorities. The expertise provided is thus "tailor-made" to the specific needs of the hosting MS (COM(2015) 490 final/2, 2). The rules for these hotspot areas have been enshrined in recital 25 of Frontex's 2016 regulation, according to which the European Commission and other relevant agencies are in charge of ensuring the compliance of activities within these areas.

The expansion of the agency's tasks needed to be accompanied by a correspondent increase in the agency's *resources* as well as a change in its organisational structure. The new EBCG hence disposes of (1) European Border and Coast Guard Teams from a rapid reaction pool for JOs and rapid border interventions; and (2) a technical equipment pool, which would assist the Commission in co-ordinating the activities of the migration management support teams at hotspot areas. Frontex's tasks in the hotspots entail screening, registering, and fingerprinting migrants that arrive to the shores of the host MS. The agency is also responsible for providing mobile offices for its dispatched experts and debriefing to each asylum seeker.<sup>105</sup> The rapid reaction pool has to be a standing corps as eventually approved in the final text of the 2016 regulation and represents an absolute novelty.

Given Frontex's task expansion, the next two sub-sections analyse the agency's resources in terms of budget and staff as well as its widening issue scope.

#### **4.1.2 Frontex's Capabilities**

All the activities that the border agency has to perform need to be backed by the necessary financial and personnel resources. The fact that Frontex's capabilities depended once on the decisions of its multiple principals exclusively, highly limited the agency's range of action.

In the following, changes in the agency's staff and budgetary resources, which occurred over the years following a growing trend, are outlined in detail. The most remarkable changes in this regard occurred during specific emergencies as for instance in 2011 and 2015,<sup>106</sup> thus revealing the link between the outbreak of a crisis and the border agency's upgrade in terms of capabilities.

Frontex's establishing regulation defined in general terms the composition of the agency's staff (Article 17(3)), which should consist of officials and national experts in the field of control and surveillance of the external borders seconded by the MS to carry out management duties. The remaining staff consists of other employees recruited by the agency.<sup>107</sup>

Frontex's composition of staff is characterised by a high number of temporary administrators (AD) and seconded national experts (SNEs). Liaison officers deployed in third

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<sup>105</sup> Whereas Frontex plays a major role when it comes to screening and return operations at the hotspots, the experts of the Support Office provide their support in the Italian and Greek hotspots by helping the host MS with the registration of asylum seekers and the groundwork of the case file.

<sup>106</sup> In 2015, there were eight amendments to the EU budget, in order to better address the migration crisis (Kamarás, Saunier, and Todaro 2016).

<sup>107</sup> The Staff Regulations of officials of the EC, the Conditions of employment of other servants of the EC and the rules adopted jointly by the EC institutions apply to Frontex's staff.



countries *and*, after the 2016 reform, in MS (more details follow in sub-section 4.1.3) as well as other relevant experts work for the agency too.

One of the most important categories of Frontex's staff are its SNEs. The SNEs should be drawn from government or State departments in MS either from the national, the regional or the local level, but could also come from the private or voluntary sector, IOs or third countries (Frontex Management Board 2005d). Although closely linked to the MS of origin, each SNE once seconded, becomes a full member of the agency's staff, acting on behalf of Frontex *only* and ignoring national or interests other than the ones of the border agency.<sup>108</sup> The periods of secondment shall not exceed two years nor be less than six months and a SNE contract can be renewed up to a total period of four years.<sup>109</sup> SNEs are extremely relevant within the agency's composition of staff, since they represent those staff members that carry out all operational activities in the field of control and surveillance of the external borders (MB Decision 12/2005 on Frontex Draft Budget 2006: 2). Through these experts, Frontex specialised over time in a specific sub-policy through intensified activity on the ground. This experience becomes an indispensable precondition for primary principals to co-operate. The border agency does not only exchange information with and between its principals, i.e. national authorities and EU institutions as the Commission, but it is also in a constant dialogue with other EU agencies and organisations.<sup>110</sup>

In 2006, the Commission had proposed to create European border guard teams to swiftly fight illegal immigration and to contribute to the creation of coherent immigration and asylum policies. These teams of multi-national border guards would be funded out of the European budget and able to respond within ten days from the beginning of a potential crisis. Wearing uniforms of their respective countries as well as a European armband, the teams would be placed under the control of the *host* MS, i.e. the MS on whose territory the border teams'

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<sup>108</sup> The SNE "shall behave solely with the interests of the Agency in mind. He/she shall neither seek nor take instructions from any government, authority, organisation or person outside the Agency." (Frontex Management Board 2005d).

<sup>109</sup> The only exception to this rule is in the event of a period of six years elapsing between the last and the new secondment. In this specific case, a SNE can be seconded again by the border agency. Moreover, the MB envisaged the possibility of "cost-free" SNEs, i.e. SNEs for whom the agency does not have to bear any costs and who may be seconded from the public administration of MS, non-member countries and from IOs "in pursuance of a reciprocal and simultaneous exchange with Agency officials" (Article 2 and 4 of the 18/2005 MB decision).

<sup>110</sup> According to the working arrangement between Frontex and EASO of 2012 (Frontex and EASO 2012), for instance, both agencies shall engage in exchanging information on the operational activities that they carry out as well as on the composition and best practices on the functioning of their respective expert pools. Both migration agencies can accordingly establish additional common or mixed teams from their pools, in order to substantiate co-ordinated operations.

deployment would take place, while being co-ordinated by Frontex. Back then, the creation of these border teams was regarded as a further chance for Frontex to “see its role bolstered” (Agence Europe 2006). The Commission’s proposal anticipated the creation of Frontex’s Rapid Border Intervention Teams (bearing the amusing acronym of RABITs), which were officially established in 2007 through a separate regulation (Regulation (EC) No 2007/2004). The RABITs were intended to provide swift assistance to MS in case of urgent situations, but not for long-term assistance.

Ever since the agency’s establishment, besides the availability of expert border teams, technical equipment has always been another highly debated issue within Frontex’s mandate. In 2009, an external evaluation underlined the weakness of the mechanism for the deployment of RABITs and related procedures, mainly because of the difficult availability of technical equipment necessary to carry out JOs. The availability of technical equipment depended on the political willingness of MS, for whom it was not compulsory to deliver the promised equipment via the Centralised Record of Available Technical Equipment (CRATE) finalised in 2006. The external evaluation carried out in 2009 had relatedly suggested some alternatives, such as allowing the agency to lease private equipment (COWI A/S 2009, 7). When in 2011 the Council and the EP decided to amend Frontex’s regulation, the RABITs were renamed to European Border Guard Teams (in short EBGT), which represented between 2011 and 2016 a further pool of experts selected and made available by the MS for deployment into the agency’s co-ordinated JOs, pilot projects, and rapid interventions. The members of the EBGT were distinct from Frontex’s ‘headquarters’ staff and trained by the agency in relevant union and international law, including fundamental rights and access to international protection. Seconded Guest Officers (SGO), i.e. border guards from the EU MS seconded to Frontex for the period of up to six months, were also members of the EBGT.

With the 2016 regulation establishing the EBCG, the EBGT were eventually replaced by the ‘European Border *and Coast* Guard Teams’ as part of the rapid reaction pool. Primary principals contributed to the pool according to the specialisation of the respective country, the size and the availability of their national border guards’ pool.

Since the comprehensive 2016 reform, Frontex’s staff composition has only slightly changed. The most relevant innovation is of a quantitative value through the creation of a new pool of return experts and a new rapid reaction pool of 1,500 border guards and other officers. Both should be at the immediate disposal of the agency alongside with a rapid reaction equipment pool (e.g. vessels and helicopters), in order to avoid staff shortages during emergencies (European Commission 2015a and later Article 20(5) of the 2016 regulation).

The new pool of return experts is subdivided into the respective pools of *return* monitors, escorts, and specialists (as set out in Articles 29ff. of Frontex’s 2016 regulation), from which the agency has to constitute “tailor-made European return intervention teams for deployment during return interventions” (Article 32). As of 2017, the new return pool consists of 690 experts (return monitors, escorts, and specialists), whose main task is to identify irregular migrants and co-ordinate return operations, including co-operation with consular authorities of the returnees’ countries of origin. The agency’s MB is again the body in charge of determining the “profile and the number of return specialists” after receiving a proposal by the EBCG’s ED. The vacant available posts within the new pool of return specialists have been filled with experts coming from national competent bodies but also from the agency itself (Frontex Management Board 2016b).<sup>111</sup>

Annex I to the 2016 regulation pragmatically lists the number of border guards that each MS has to provide to the new standing corps of the agency, in order to reach the total number of 1,500. This rapid reaction pool needs to be at the immediate disposal of the agency, in order to be deployed from each MS within five working days from when the operational plan is agreed upon by the ED and the host country. The rapid reaction pool of the EBCG represents an absolute innovation because of the minimum number of border guards that it *has to* be composed of and its standing character. Whereas the RABITs depended on the planned duties, availability and frequency of deployment of the agency’s primary principals, here was a new ‘standing’ corps, a permanent body, that would guarantee for the border agency from 2016 onwards to deploy border and coast guard officers as well as other relevant staff in a quickly manner if an urgent situation was to arise at the EU external borders. Since 2016, the reformed Frontex is thus able to deploy border and coast guard officers from its own rapid reaction pool and to purchase its own equipment, which it should acquire alone or in co-ownership with MS.

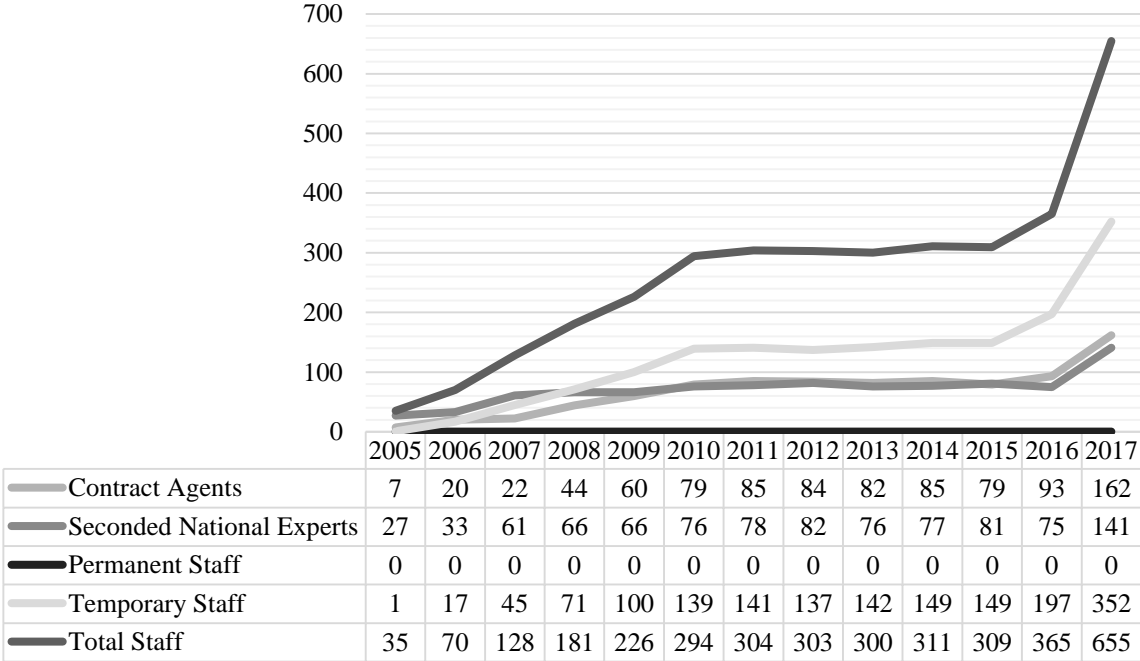
As regards the historical development of the border agency’s staff numbers, Frontex started off in 2005 (which corresponded to its first operational year) with a total staff of 35 people. In 2017, the reformed border agency closed its activities at the end of the year with 655 employees at its disposal. However, during the most challenging years of 2015-2016

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<sup>111</sup> In occasion of the EBCG’s first anniversary in 2017, Frontex published a review of its past twelve months as a reformed agency. The review specifies further that whereas return escorts (see Article 30 of Frontex’s 2016 regulation for more details) support national escort officers during co-ordinated return operations, *forced*-return monitors (regulated in Article 29) carry out ‘independent’ monitoring to ensure compliance with fundamental rights (Frontex 2017d, 3). The addition of the word ‘forced’-return had already been introduced with the amendments of 2011. This semantic change underlined the more consistent course that the EU had decided to adopt following the massive increase of migrants entering the EU territory.

when the agency would have needed higher numbers of staff beyond anything else, no significant changes were registered (Figure 4.1).

Figure 4.1 Frontex’s Staff



Own elaboration. Source: Frontex’s Governance Documents (Frontex 2017b)<sup>112</sup>

During the crisis, Frontex’s requests to increase its staff concerned primarily the mentioned EBGT members. As stated in Frontex’s report of 2015, about 2900 border guards were registered that year as EBGT members, but Frontex’s ED Fabrice Leggeri declared soon after the report had been issued that the existing system had nevertheless reached its limits (Leggeri 2016). Moreover, the agency could not get Eurodac (which stands for European Dactyloscopy) devices to register the refugees fleeing into the EU.<sup>113</sup> By the end of 2015, it was evident that insufficient staff was hindering an efficient solution to the crisis situation, although Frontex had requested more than once reinforcements from its primary principals, as for instance 775 coastguards at the hotspots in Greece, of which only 447 were eventually sent (Agence Europe 2016a). During the Schengen crisis, Frontex also needed to ask for a

<sup>112</sup> In Figure 4.1, the total amount of Frontex’s permanent staff amounts to zero. However, Frontex Expert 3 clarified this specific aspect and explained that each new staff member at the border agency gets a 5 year-contract with the prospect of this contract being renewed. If the contract is renewed twice, it automatically becomes open-ended.

<sup>113</sup> Mr. Leggeri announced that Frontex would have in the future “to develop its own resources, its own tool either of border guards, or of devices or operational assets. [...] Indeed this agency Frontex and the new European and Coast Guard Agency need to have more means but also more powers [emphasis added]” (Leggeri 2016).

reinforcement of its ships and aircrafts (e.g. Deutsche Welle 2015). Although some of the border agency's requests for an enhanced mandate and increasing resources were met through the reform of 2016, most of the needed changes were implemented far too late, hindering Frontex from responding swiftly and effectively to the migration crisis.<sup>114</sup> The availability of specialist expertise is a necessary condition for any agency to work effectively according to its mandate. During the crisis, MS were for too long reluctant to provide personnel support and thus increase the agency's number of staff. At the same time, primary principals expected the agency to perform swiftly and effectively to contain migratory flows. This mutual dependence and unfulfilled expectation added up to an already problematic situation at the EU borders.

Before and throughout negotiations on the new EBCG the multiple agents, i.e. Frontex and the Commission, backed up by the EP, had emphasised more than once the crucial importance of primary principals providing expertise in response to Frontex's ongoing calls for experts (European Commission 2016a, 9; Kamarás, Saunier, and Todaro 2016). Although intermediate principals had mobilised the unprecedented sum of over €10 billion in response to the migration crisis, this increase was not followed by matching contributions in staff from a large majority of Frontex's primary principals.

The expertise that Frontex offers today is of "high qualitative value" (Interview with Frontex Expert 4 2018). Frontex can draw on a huge network of national experts and organisations, which represents an added value for the agency. The agency's mandate stands at the threshold to European policy-making, especially through the release of its risk analyses, a circumstance that can allow the agency to indirectly influence decisions even when it comes to sensitive political decisions (Interview with Frontex Expert 2 2018).

Data gathered from interviews, academic literature and official documents, such as Frontex's activity reports, corroborate the assumption that Frontex's know-how and activity are highly regarded in the eyes of the primary principals and supranational institutions. An interesting aspect in this regard is the size of the EBCG's *permanent* staff. In the agency's general reports prior to the 2016 reform, the agency lists temporary agents and SNEs only,

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<sup>114</sup> A further episode that illustrates the bad impact of Frontex's staff shortages (but also EASO's, as shown in the next Chapter 5, given that the activities of both migration agencies are closely intertwined on the ground) on the overall response to the Schengen crisis, was the difficult start of the EU-Turkey migrant agreement of March 2016. Despite the urgency and importance of the request, the willingness of Frontex's primary principals to provide sufficient staff was weak. MS provided only 396 police officers out of the 1,500 requested – with Germany and France being the most co-operative countries and the only ones to offer additional reinforcement of people (Agence Europe 2016b).

whereas in its first annual activity report after the reform of 2016, a permanent staff is established and planned to be more than doubled over the coming years (Frontex 2017a, 9). This growth together with the creation of three new expert profiles corresponding to the new tasks in the area of return indicate that the agency's high expertise was officially acknowledged. As stated in its annual general report of 2016, the EBCG aims at remaining the "preferred provider of operational support and expertise" to its principals, specifically the MS and the Commission (Frontex 2017a, 14). After 2015, the expansion of the agency's activities through the launch of new JOs consequently required a further increase in deployed experts (*ibid.*, 69).

Increasing numbers of staff need to be coupled with growing financial resources. Every year, once Frontex's ED has forwarded the draft statement of estimates of both revenue and expenditure for the next financial year to the MB, the latter submits the draft budget to the agency's three intermediate principals: first to the European Commission (together with Frontex's programme of work), which then in turn takes the preliminary budget to the next step and enters its estimates in the general budget. The draft budget becomes the adopted budget<sup>115</sup> only after the EU's budgetary authority, i.e. the EP and the Council, has approved it. EU funding for Frontex (and also in general for the policy areas migration agencies act in), is mainly channelled through the AMIF and ISF (mentioned in sub-section 3.1.4), which are both foreseen in Heading 3 of the Multiannual Financial Framework (MFF).<sup>116</sup>

Frontex's 2004 regulation established that the expenditure of the agency needed to cover (1) administrative, (2) infrastructure, (3) operational as well as (3) staff-related expenses. The agency's budget, or more specifically its revenue, consists of three main components. First, the Union's subsidy entered in the general budget of the EU, which is proposed by the European Commission and then approved by the budgetary authority. Second, pre-established contributions from those EU MS that are members to the Schengen *acquis* as well as further voluntary contributions from MS; and finally the fees for services provided (Article 75 of Frontex's regulation of 2016). Hence, both primary principals and intermediate principals strongly influence the financial resources of the border agency. After the funding is settled

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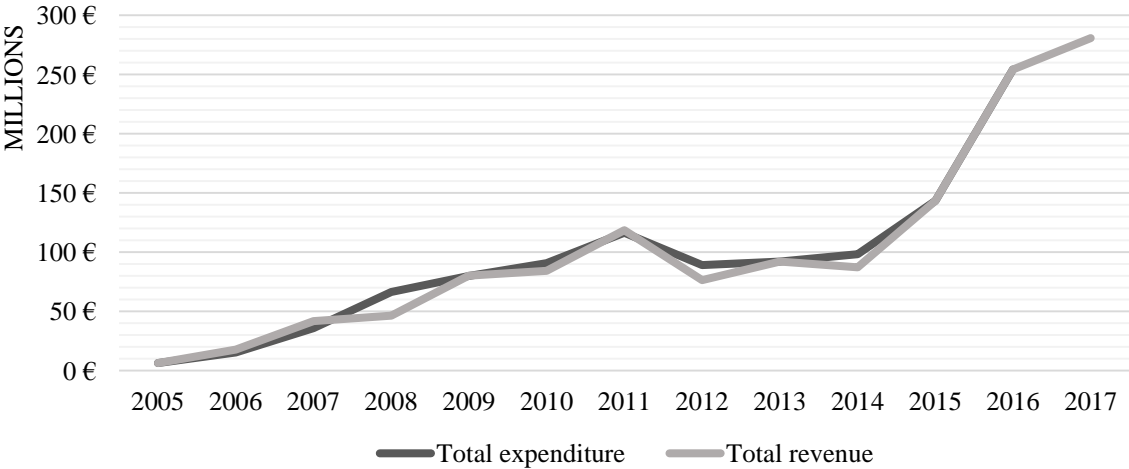
<sup>115</sup> According to Frontex's financial regulation of 2005, the budget is the instrument that for each financial year "forecasts and authorises the revenue and expenditure considered necessary for the Agency" (Article 4, Frontex Management Board 2005b).

<sup>116</sup> The MFF is the seven-year framework regulating the annual budget of the EU and setting the maximum amount of spending in the EU budget each year for broad policy areas (so-called 'headings'). For further details visit the website of the European Commission on the EU budget available online under [https://ec.europa.eu/info/about-european-commission/eu-budget/spending\\_en](https://ec.europa.eu/info/about-european-commission/eu-budget/spending_en) (last accessed on 08.08.2018).

and the yearly budget approved of within the MB, the corresponding department at each national ministry of the interior can start its work with the agency. Joint decisions among primary principals in the area of border control need to be taken point by point.<sup>117</sup> The agreed contribution by each MS should at least correspond to the minimum number of items of technical equipment previously established for a given year.

The initial budget of Frontex amounted to €6,280,199 in 2005 (first operational year)<sup>118</sup> and raised to €280,560,000 in 2017 with an enormous increase of approximately 4360%. *Figure 4.2* shows how Frontex’s total revenue (corresponding to EU contributions plus Frontex’s own income) and expenditure have evolved over time. Since the agency’s inception, the budget has been constantly increased, reaching its peaks during the most challenging years in 2011 as well as between 2014 and 2016. For the years 2015 and 2016 Frontex’s budget was amended more than once, in order to adapt the agency’s funds to the increasing challenges it was facing. After the reform of 2016, a regular increase in the EBCG’s resources continued to be adopted.

Figure 4.2 *Frontex’s Budget*



*Own elaboration. Source: Frontex’s Governance Documents (Frontex 2016)*

In sum, while a continuous increase in the agency’s budget was approved over the years, Frontex’s staff availability lagged behind. As featured in the 2015 external evaluation of

<sup>117</sup> For instance, MS have to contribute border guards for specific operations as well as technical equipment on the basis of annual bilateral negotiations and agreements with the border agency (Article 20(11) and Article 39(8) of the 2016 regulation). Given that the contributions to the border guards and technical equipment pool are based on annual bilateral agreements between the agency and each MS, they have to be annually reviewed.

<sup>118</sup> In 2005, Frontex did not have financial autonomy and the European Commission was in charge of implementing the agency’s budget. Since it was the agency’s first operational year, the only expenses incurred were in the administrative field (specifically payments to the staff and meetings of the MB). The Commission transferred to Frontex the subsidy for the 2005 operational expenditure only in December of the same year.

Frontex, the evolvement of the agency's activities "did not correspond to an increased allocation of human resources." (Ramboll Management Consulting and Eurasyllum Ltd 2015, 10). Although the intermediate principals agreed to amend Frontex's tasks and budget, raising the latter accordingly against the continuous demands of the multiple agents (Commission and agency), the increase of financial resources was not accompanied by a sufficient increase in human resources (by comparing *Figure 4.1* and *Figure 4.2* and specifically the years of 2015 and 2016, the mentioned difference becomes visible). After having outlined so far the evolution of Frontex's tasks and capabilities, the next sub-section turns to the development of the agency's issue scope.

### **4.1.3 Frontex's Issue Scope**

In the following, I outline the agency's evolving issue scope, that is the scope of issue areas in which Frontex carries out its tasks. The issue scope of the agency's mandate is the third and last component of the empowerment notion (Heldt and Schmidtke 2017; Koremenos, Lipson, and Snidal 2001). The single issues in the border control sub-policy in which Frontex is allowed to act, have changed and broadened over time. Since 2016, numerous pre-existing issues of scope in Frontex's mandate have been further expanded while new areas of activity were added, such as interventions in MS and close monitoring, allowing the agency an increasing range of action.

Frontex's activity falls into four main categories: risk analysis, training, operations, and research. Risk analyses are meant to assess risks and threats at the external borders of the EU. The border agency had been given since its establishment "a key-role by the EU Member States in implementing the concept of 'integrated border management'" (Léonard 2010, 234). The IBM concept has underpinned the development of EU co-operation on border controls since 1999 and epitomizes the joint effort of MS' to 'fuse' their national border authorities (Parkes 2015, 67).

Even after the significant reform of 2016, the core of Frontex's rationale remained almost unchanged. Besides the implementation of the essential IBM notion, the elaboration of risk analyses is still at the heart of Frontex's operational work. In 2005, for instance, during the agency's first operational year, the presidency of the Council requested Frontex to produce a risk analysis in view of the approaching Schengen evaluation of the back then ten new



acceding EU MS.<sup>119</sup> This episode demonstrates how since the early stages of Frontex's existence, other EU institutions besides the Commission and single MS started relying on the agency's expertise and activity before taking decisions at the EU level. All tasks relative to risk analyses remain also within the new agency's mandate an essential issue of scope. Following the CIRAM,<sup>120</sup> decisions for launching new operations at the external border of the EU are tied to the content of the agency's risk analyses, which represent therefore an unmatched powerful instrument to direct intermediate principals' decisions, including those of the European Commission (e.g. the impact of Frontex's risk analyses when monitoring the implementation of the Schengen *acquis*).

In 2005, the MB had already established the agency's organisational structure and adopted the agency's staffing policy. Back then, the ED Ilkka Laitinen was flanked by five advisers and managed four distinct teams: an operational team; a risk analysis team; a training, research and development team; as well as an administrative team (see *Figure 4.3(a)*; Frontex Management Board 2005a). Besides increasing tasks and resources, the border agency needed a structural transformation of its internal organisation. Initially, the organisational structure of the agency was far less complex than after the 2016 reform and represents hence a good proxy, to understand in which issue areas Frontex has operated over time. *Figure 4.3(a)* and *(b)* shows how the expanded mandate of the agency was accompanied by an enlargement of its units and divisions as a direct consequence of a an expanding issue scope as well as growing tasks and resources. After the reform of 2016, the agency is more involved than ever in creating and implementing migration management in the EU (Frontex European Border and Coast Guard Agency 2018).

In its report for the year 2015, the border agency stressed one of the most important novelties introduced by the Commission's Agenda on migration, namely "the enlargement of the *scope* of the Agency's support to national authorities in the identification and registration, including fingerprinting of migrants at the hotspot areas." (Frontex 2015, 6 [emphasis added]). Both the introduction of the hotspot areas and the vulnerability assessment task have enormously expanded the *scope* of the agency.

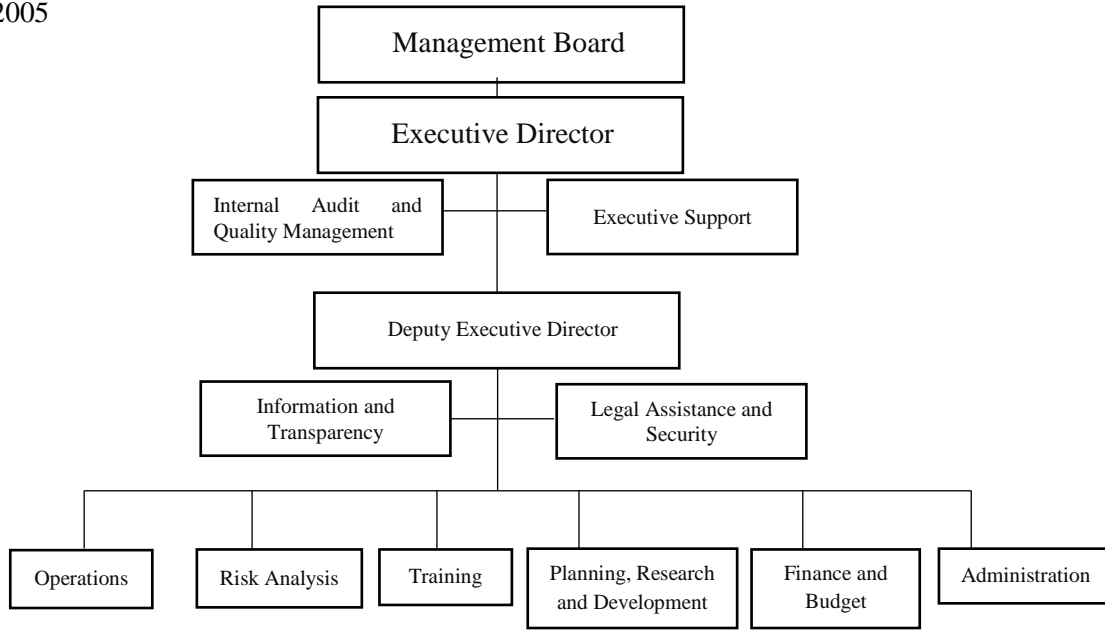
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<sup>119</sup> The request was forwarded through an official letter addressed to Frontex's former (first) ED, Colonel Laitinen. For details see the Council's document on the Preparation of the Schengen evaluation of the new Member States – Letter to the Frontex agency: Request for risk analysis available online under <http://data.consilium.europa.eu/doc/document/ST-12222-2005-INIT/en/pdf> (last accessed on 01.02.2019).

<sup>120</sup> The CIRAM concept existed before Frontex's creation. The first CIRAM goes back to 2002, two years before the establishment of the border agency. Back then, it was developed by a European Council Expert Group and then revised in 2007 when the agency was already in place (cf. Léonard 2010).

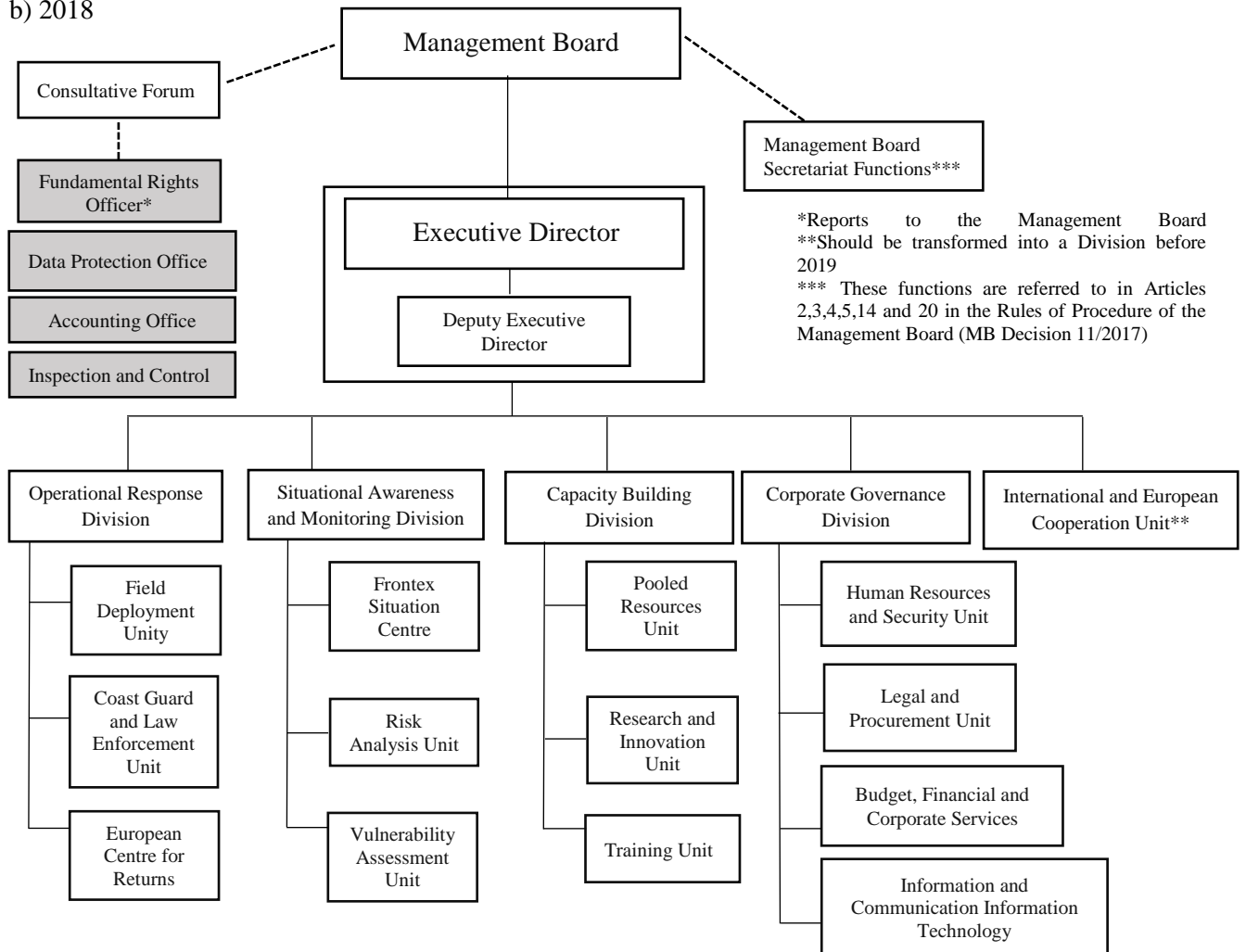
Figure 4.3 *Frontex's Organisational Structure's Evolution*

a) 2005



Source: Frontex Management Board 2005c

b) 2018



\*Reports to the Management Board  
 \*\*Should be transformed into a Division before 2019  
 \*\*\* These functions are referred to in Articles 2,3,4,5,14 and 20 in the Rules of Procedure of the Management Board (MB Decision 11/2017)

Source: Frontex 2018b

As mentioned in the analysis of the agency's tasks (sub-section 4.1.1), the agency's 'right to intervene' was the most controversial issue included in the Commission's 2015 proposal, which is also closely related to the risk analysis task. Once the border agency has assessed the 'threats', it proceeds with a *vulnerability assessment* (Article 13(8) of Frontex's regulation of 2016), which represents the precondition for a final *impact assessment*. The aim of the vulnerability assessment, which might lead to Frontex's intervention on the territory of a MS, is to assess the 'readiness' of the agency's primary principals to face challenges at the external borders and thus prevent future crises. When necessary, Frontex's ED has to make a recommendation in consultation with the concerned MS, setting out the necessary measures and the time limit within which they need to be implemented by the concerned MS.

As a result of the vulnerability assessment, Frontex can exercise its right to intervene in two specific cases. First, when a MS does not comply with a "binding" decision of the MB to address vulnerabilities at the EU external borders; second, in the event of "disproportionate migratory challenges" at the external borders of the EU that might jeopardise the Schengen area (Article 13(8) of Frontex's regulation of 2016). In order to reach a compromise between the intermediate principals on this matter, the regulation of 2016 eventually envisaged a specific procedure for the new EBCG to exercise such a right supported by all intermediate principals, including the EU legislators (more details follow in sub-section 4.2.3). The right to intervene has thus to respect the intermediate principals' 'hierarchy'. In the event of one of the two aforementioned cases necessary to exercise such a right, the EBCG has accordingly to await a decision adopted by the Council, based on a proposal of the Commission. The very content of the Commission's proposal needs to be preceded by a consultation among the multiple agents, i.e. between the Commission and Frontex. At the same time, the EU Executive needs to immediately inform the EP of such a process (the latter playing thus a more prominent role in the performing process of Frontex's additional tasks compared to the initial years of the agency's activity). Eventually, the decision adopted by the Council allows the agency to assist MS and *intervene*, while based on the Council decision, the MS concerned is required to co-operate with the agency (Article 19 of Frontex's regulation of 2016). If a MS opposes the Council's decision to receive assistance in co-operation with Frontex, the other EU countries may, in these "exceptional circumstances", temporarily reintroduce border control at internal borders (Article 29 of Regulation (EU) 2016/399 on the Schengen Borders Code).<sup>121</sup>

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<sup>121</sup> For further information visit the Council's website available online under <https://www.consilium.europa.eu/en/meetings/jha/2017/10/12-13/> (last accessed on 21.3.2019).

In contrast to the final regulation adopted, the Commission's proposal had foreseen that the ED's decision 'should be binding on that Member State' and where the necessary measures were not taken within the set time-limit, the matter needed to be referred to the EBCG's MB for further decision (recital 13, COM(2015) 671 final). Whereas this first version bestowed more power on both the agency and specifically its ED, in the final text of the adopted regulation decisional power was shifted to the primary principals' representatives sitting in the MB. If the concerned MS does not take the measures foreseen in the recommendation of the ED, the MB after notifying the Commission, adopts a decision that is *binding* on the MS. If, again, the MS does not implement the measures foreseen in the MB's decision, Frontex's MB has to 'notify the Council and the Commission' (recital 8 of Frontex's regulation of 2016). Hence, if a situation requiring urgent action arises, the European Commission takes action by first consulting Frontex and then, upon this consultation, proposing a decision that needs to be approved by the Council, while the EP has to be merely informed of that situation and of all subsequent measures and decisions taken in response (Article 19(2)).

The institutional steps related to the 'vulnerability assessment' thus recreate a certain power imbalance between intermediate principals (in particular between the Council and the EP) as was the case in Frontex's establishing regulation of 2004. Nevertheless, its introduction allows the EBCG to reach new levels of power and influence.

The role of Frontex's liaison officers in MS is another absolute novelty introduced by Frontex's regulation of 2016 (Article 12) and adds to the close monitoring of MS exercised by Frontex. Liaison officers existed before, but only to be deployed in third countries and in Brussels, where they have been operational for more than a decade. The history of Frontex's liaison officers dates back to the early 2000s. In 2004, the Council had created an immigration liaison officers (ILOs) network posted in third countries, in order to exchange and maintain contacts between MS' representatives of the different EU countries' immigration services and contribute to the prevention and fight against illegal immigration.<sup>122</sup> This was the groundwork for the inclusion of liaison officers in Frontex's staff composition.

The deployment of liaison officers in MS was approved in 2016 not only to regularly monitor the management of the external borders, but also to enhance Frontex's reputation in Brussels (Interview with Frontex Expert 3 2018). Although the office in Brussel is rather small, envisaging only three people in total, it has an essential role in guaranteeing regular

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<sup>122</sup> Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network [2004] OJ L64/1 (Council of the European Union 2004a).

exchange of information between the agency and the EU's institutional epicentre. Against this backdrop, the new idea of the liaison officers' role has a horizontal approach: every liaison officer is in charge for one MS or cluster of MS (as for instance in the case of the Benelux countries), in order to represent the border agency across Europe and display its constant presence on the ground. Each liaison officer is appointed among the experts of the agency's staff to ensure regular monitoring of the MS' management of their external borders (Article 12(a) and (b) of Frontex's regulation of 2016). She or he works as an interface between the agency and the national authorities, since the liaison officers' main two tasks consist in reporting on specific sensitive issues to the national (or European in Brussels) authorities in charge and in fostering co-operation.

For their reporting and consulting tasks, liaison officers need to be briefed by other experts working in Warsaw, thus ensuring a constant information exchange with the headquarters too (Interview with Frontex Expert 3 2018). Frontex's liaison officers in Brussels co-ordinate *daily* with the European Commission and sometimes external authorities participate in the meetings as well. The main reference at the Commission is of course the DG HOME, but the border agency also co-ordinates with other DGs, such as the Directorate-General for International Cooperation and Development (DG DEVCO) or the DG for Neighbourhood and Enlargement Negotiations (DG NEAR) for third country co-operation.

Besides the negotiations and meetings between the agency's liaison officers and national or EU representatives, bilateral meetings between representatives of MS' border authorities take also place (Interview with Frontex Expert 4 2018). Frontex fosters and maintains additional pivotal co-ordination with the EEAS,<sup>123</sup> as well as its further intermediate principals, the EP (especially its Committee on Civil Liberties, Justice and Home Affairs, in short LIBE Committee)<sup>124</sup> and the Council. Co-ordination between the agency and the EP is on a more regular basis and rather officialised, since multiple hearings take place in front of the EP's LIBE Committee as well as meetings with specific EP's working parties (Interview with Frontex Expert 3 2018).

Co-ordination with the Council is also of particular relevance. Article 71 TFEU bestows

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<sup>123</sup> Co-operation with the EEAS was finalised in a written working arrangement (Frontex 2014), which however when downloaded from the border agency's website corresponds to a letter waiting for approval from the EEAS.

<sup>124</sup> As for today, MEPs are divided up among 20 specialised standing committees. These committees instruct legislative proposals through the adoption of reports, propose amendments to the plenary and appoint a negotiation team to conduct negotiations with the Council on EU legislation. They also adopt own-initiative reports, organise hearings with experts and scrutinise the other EU bodies and institutions. The EP can also set up sub-committees and special temporary committees to deal with specific issues, and is empowered to create committees of inquiry to investigate alleged contraventions or maladministration of EU law (European Parliament 2018a).

upon the Council the power to set up a common policy on external border control by creating a Standing Committee within the Council itself for the promotion and strengthening of internal security (see also Mungianu 2016, 23). Within this Committee on internal security, a “cozy committee” as one of the interviewee put it, Frontex exchanges know-how not only with the Council but also with other actors such as Europol. The role of the agency is strategic and operational, but the liaison officers should not be confused with “policy-makers” (Interview with Frontex Expert 3 2018). The system of the EU is multi-layered and deeply rooted in the knowledge produced by experts and information exchanged between institutions (e.g. Héritier 1996). Within this framework, Frontex’s liaison officers<sup>125</sup> are an essential link facilitating such an exchange of information between the MS and the EU as well as the consequent production of knowledge affecting European policy-making. Hence, although Frontex’s staff members cannot be defined as policy makers, their work indirectly affects the decision- and policy-making through the information and assistance they provide.

The know-how and expertise Frontex is able to offer, have turned the agency to be an indispensable reference point for its primary principals. As a result, the new EBCG’s regulation introduced a further important change, namely the idea of a *shared* responsibility. Specifically, the IBM “should be implemented as a shared responsibility of the Agency and the national authorities responsible for border management” (recital 6 of Frontex’s regulation of 2016). The 2016 regulation stretched Frontex’s responsibility even further by extending the complaint mechanism, if any fundamental rights should be infringed. As exemplified by the classic renowned claim ‘with great power comes great responsibility’, the increasing and officialised responsibilities of Frontex are a direct consequence of its increased powers.

Fundamentally important for the work of the agency is furthermore the European Border Surveillance System. This system was introduced through Regulation (EU) No 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (Eurosur), which adds to the EBCG’s issue scope. Eurosur was created to provide national authorities *and* Frontex with the necessary infrastructure and tools to enhance their reaction capability “for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants” (recital 1

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<sup>125</sup> Frontex’s MB further proved the importance of this staff category with regard to the enhancement of co-operation with third countries of origin and transit by deciding on their deployment in prioritised regions outside the EU. In March 2016, the MB decided to favour the deployment of liaison officers in regions that were categorised as highly relevant for the fight against illegal immigration, namely the Western Balkans, North and West Africa as well as the Horn of Africa (Frontex Management Board 2016a).

of the Eurosur regulation). The Eurosur system is a communication network, which was established as the result of an increasing number of tragic deaths in the Mediterranean Sea.<sup>126</sup>

Another issue in the agency's scope experiencing expansion was the 'return' issue. It was Frontex's regulation of 2016 that remarkably extended the agency's mandate in matters of return. Since return operations are closely intertwined with the national aim of ensuring security on the ground, internal security threats largely led to this change. Return operations carried out by the agency include after 2016 also 'voluntary departures', which represent a novel concept (Article 27 of Frontex's regulation of 2016).<sup>127</sup> The legislators further ensured that the agency would carry out return operations without entering into the merits of return decisions, which are still taken by national authorities (Article 28). As in any operational matter, after a proposal of the agency's ED the border agency's MB decides on the actual *modus operandi* of the return operation to be carried out.<sup>128</sup>

The real landmark introduced by the 2016 regulation in the field of return is, however, the 'pool of return experts' (as mentioned in sub-section 4.1.2), which started in January 2017 in order to support and expedite the return of migrants. This new return pool is composed of experts that the border agency can draw from EU MS and Schengen associated countries. Ever since its establishment, Frontex has always regularly organised return operations, for which it still bears all expenses, and has consequently gained an unmatched expertise on the matter.<sup>129</sup>

Frontex' establishing regulation had merely referred to 'return cooperation' between the agency and the EU MS without envisaging a standalone pool of return experts at the agency's

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<sup>126</sup> Some MEPs criticised the final text of the Eurosur regulation, because it fell far short of what was needed to enhance the rescue capabilities of the EU MS and Frontex (The Greens - European Free Alliance in the European Parliament 2013). They lamented that through the Eurosur system MS could only file a request to Frontex for the surveillance of the Mediterranean Sea in order to prevent illegal immigration, but not for so-called SAR operations to save lives at sea (Interview with Frontex Expert 2 2018).

<sup>127</sup> Frontex's newly designed website, subsequently lists the single steps for return operations to take place. Voluntary return, which is promoted by national authorities sometimes in co-ordination with IOs (e.g. the Reintegration and Emigration Program for Asylum-Seekers in Germany (REAG) and the Government Assisted Repatriation Program (GARP) involving both German regional and local authorities supported by IOM) is the first listed step to foster returns. The so-called 'return decision' is the second listed step. Such a decision looms on non-EU nationals that can no longer legally and legitimately stay within the EU borders according to the court or the authority in charge. Any person has however the right to appeal against such a decision. In those cases where the identification of a TCN is impeded by the lack of regular travel documents, no EU MS has the right to return that person. For these specific cases, the country of origin of the person in question needs to be contacted and asked to issue the proper documents. Within this process of identification, Frontex can also assist the national authorities involved (see for instance Article 31(1) of Frontex's regulation of 2016).

<sup>128</sup> Whereas in 2015 Frontex returned approximately 3,500 people (Frontex 2016), the agency reported that in 2016 it had co-ordinated the return of 10,700 migrants in 232 return operations (Frontex 2017a, 9).

<sup>129</sup> JROs have, for instance, between 2010 and 2014 increased from 39 to 45, whereas in the period before 2010 none were registered (Ramboll Management Consulting and Eurasyllum Ltd 2015, 23).

disposal. Instead, it had limited the agency's scope of action chiefly to the identification of best practices on the removal of TCNs illegally present on the EU's territory, thus preserving the MS' supremacy on the matter (Article 9 of Frontex's establishing regulation).<sup>130</sup> Frontex was back then to provide assistance, but not to *monitor* the correct implementation of the return operations as was then established in the regulation of 2016.

In 2017, Frontex co-ordinated 341 return operations with more than 14,000 returnees (Frontex European Border and Coast Guard Agency 2018, 7).<sup>131</sup> The increasing number of returns are obviously relative to the increasing number of entries during the migration crisis; however these numbers also stand for the growing relevance that the return issue achieved in Frontex's overall scope. As a result, the Commission stressed that Frontex should be transformed into a "true operational EU return hub", in order for its new return tools to be fully operationalised (European Commission 2017a). Frontex acts accordingly through the European Centre for Returns (in short ECRet), which fulfils "the new tasks *given* by the European Commission" (Frontex European Border and Coast Guard Agency 2018, 25 [emphasis added]) in the field of co-ordinated return operations. This specific statement underpins the assumption that the EU legislators are not the only intermediate principals of Frontex, but that this category needs to include the Commission as well, given its role as 'delegator' and 'monitor' over the agency.

The final important element within the scope of the agency is its co-operation with third countries. Co-operation and partnerships with third countries are key elements to promote development in the migration and border control areas as well as to combat security threats (Lavenex and Kunz 2008, 444). Since 2004, such co-operation can take place in four different ways. First, as operational co-operation in terms of information exchange, risk analyses, training, research and JOs or pilot projects with countries outside the EU (e.g. the *information sharing networks* with neighbouring countries, such as the Western Balkans Risk Analysis

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<sup>130</sup> After the amendments of 2011, Frontex had also to follow the directive issued in 2008 by the Council and the EP on common standards and procedures in MS for returning illegally staying TCNs. The directive built on the idea of a common migration policy as launched by the Tampere Council in 1999 and on the 2005 'Twenty guidelines on forced return' adopted by the Committee of Ministers of the Council of Europe (Directive 2008/115/EC). For more details see the twenty guidelines on forced return available online under [https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20\\_Guidelines\\_Forced\\_Return\\_en.pdf](https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf) (last accessed on 12.08.2018).

<sup>131</sup> Return operations should not be confused with the JROs, the latter involving the participation of two or more countries. Under its new mandate the EBCG assists MS individually in national return operations, although it has to give priority to joint operations involving more than one MS. In the case of a JRO or return operations conducted from a hotspot area, Frontex is usually in charge of its co-ordination as well as of co-financing it (see Article 28(9) of Frontex's regulation of 2016). Moreover, any return operation is intertwined with a signed agreement between the MS, whose territory the TCN has entered, and the country of return.



Network, in short WB-RAN).<sup>132</sup> Second, co-operation can be fostered through *working arrangements*. These arrangements, which are equivalent in their content, should foster sustainable partnership between the EU and the region in question through the specific channel of Frontex to strengthen security at the borders. Third, Frontex can work with non-EU countries under the aegis of EU-led initiatives. Many of these initiatives stem from the GAMM<sup>133</sup> as, for instance, the Migration and Mobility Partnerships or the Eastern Partnership Initiative (Frontex 2017c). Finally, co-operation between the border agency and countries outside the EU has lately developed into technical assistance projects, launched and financed by the agency itself.<sup>134</sup> Information consequently flows from third countries through the agency to the relevant EU institutions, i.e. the Commission, the Council, and the EP as its intermediate principals, and in turn back to the primary principals, the single MS.

Against this backdrop, when negotiating the agency's new mandate in 2015 ministers agreed that the reinforcement of co-operation with third countries should remain "essential for the efficient management of migratory flows". This aspect was accordingly strengthened within the EBCG's mandate, also in view of the reinforced role of the border agency in the field of return (Council of the European Union 2015a).

By looking at Frontex's activity between 2011 and 2014, the external evaluation of 2015 had already registered the agency's "increase in scope and number of activities" mainly related to operational co-operation (for instance, in 2006 the agency co-ordinated only 20 JOs, which in 2014 increased to 62 including JRO) (Ramboll Management Consulting and Eurasyllum Ltd 2015, 22). This increasing operational activity was accompanied by a growth in resources, which precluded the official reform that was to follow.

Whereas this first analytical section was meant to highlight the main changes in Frontex's mandate following the 'three-components' structure of the existing empowerment notion, the next explanatory section engages with the two set of factors, namely principals' *and* agents'

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<sup>132</sup> The WB-RAN is composed of Frontex's RAU and the competent national border-control authorities, which in this specific case are those of Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, and Serbia. The elements around which a RAN is structured are: 1) description of border controls occurring at common borders; 2) annual risk assessments; 3) and outlook of relevant EU policy developments. Within a RAN, analysts of Frontex and countries concerned work in a team using the same methodology. These networks are set up to gather relevant knowledge and to develop best practices, alongside with the goal to offer expert knowledge to the Commission and the Council (e.g., Boehm, 2012).

<sup>133</sup> The GAMM is, since 2005, the overarching framework defining how the EU conducts co-operation with non-EU countries, based on clearly defined priorities and embedded in the EU's overall external action.

<sup>134</sup> Examples of such projects are the Eastern Partnership Integrated Border Management Capacity Building Project as well as the Regional Support to Protection-Sensitive Migration Management in the Western Balkans and Turkey. Based on Regulation (EU) No 656/2014, which establishes rules for the surveillance of the external sea borders in the context of operational co-operation, the agency has to provide technical and operational assistance not only to MS but also to third countries.

positions as well as the decision rules framing their actions. The next explanatory section thus shifts the focus to the single steps that allegedly led to the significant empowerment of 2016. The occurrence of a crisis in times of geopolitical flux and the resulting *de facto* changes in the agency's activity set in motion a series of institutional steps, which are analysed in detail in the next section, following the theorised causal mechanism presented in Chapter 3.

#### **4.2 The Causal Mechanism in the Case of Frontex**

After having outlined Frontex's mandate in terms of its tasks, issue scope as well as of its staff and budgetary capabilities between 2005 and 2017, this section engages with the main objective of the dissertation, namely offering an explanation of *significant* agency empowerment in the border control sub-policy to answer the overarching research question whether and how the Schengen crisis triggered a significant empowerment in the case of Frontex. The process behind such significant empowerment is here analysed in detail, subjecting the four parts of the hypothesised causal mechanism to process tracing, following the three outlined propositions (see sub-section 3.2.1). The aim is to explore the causality between the trigger and the outcome as well as the independent variables of the mechanism, namely the multiple principals' *and* multiple agents' positions as well as decision rules among principals. In the first part of the mechanism, it is expected that given a crisis in a specific policy the primary principals' positions diverge, leading to a deadlock situation. In the second part of the mechanism, the multiple agents are allegedly profiting from the deadlock to propose a reform of the agency in question, whereas in the third part of the mechanism, the intermediate principals are expected to follow specific unanimous, demanding decision rules, in order to reach consensus on the proposed reform. In the final fourth step, primary and intermediate principals are supposed to agree to a significant agency empowerment by adopting a new regulation. All parts of the mechanism are expected to be sensitive to specific scope conditions (or contextual conditions), namely the multi-layered characteristics of the EU system in a sub-policy where national and supranational actors share competences.

In the aftermath of the 2016 reform, Frontex does no longer simply function as “a central knot and information hub, but also as *primus inter pares*” setting out the strategy for the IBM with which MS have to comply (Rijpma 2016, 26). The EBCG is an enhanced and strengthened version of the earlier Frontex with additional supervisory powers over EU countries. Such changes in a sensitive issue area where ‘core state powers’ are involved (Genschel and Jachtenfuchs 2015), as the one regarding border control, call for a systematic explanation.

### **4.2.1 Scope Conditions and Crisis**

The upcoming two sub-sections outline first the policy framework within which the agency has acted and still acts, corresponding to the theorised scope conditions, in order to turn then to the trigger of the mechanism allegedly leading to a significant agency empowerment, namely the Schengen crisis.

#### ***4.2.1.1 Policy Framework***

This section offers a detailed analysis of the border control sub-policy. It presents important background information to understand the scope conditions, which are theorised to be necessary for the agency's significant empowerment to occur. As already illustrated in the section on the methodology (section 1.4), scope conditions are not "causally productive, but are merely conditions that have to be present for a relationship to work in a particular manner" (Beach 2017, 10). The relationship(s) in question are the single parts that theoretically lead from the trigger, i.e. the Schengen crisis, to the outcome, namely the significant empowerment of Frontex.

The policy area within which the border agency acts is a challenging work in progress (for further details see Parkes (2015) and his argument of failed agendas' reconciliation). The *intergovernmental* framework of the Schengen Agreement of 14 June 1985 laid down the groundwork for such a sub-policy. The agreement was initially "a huge set of provisions" based on common principles, standards and procedures. These provisions regulated checks and surveillance at the external borders as well as "police force actions across internal borders" (Jorry 2007, 3). Later on in 2001, the European Council set the first cornerstone for an integrated border management, acknowledging in the shadow of the 9/11 terrorist attacks, the importance of a common management of the EU external borders. On this occasion, the European Council further expanded the mandate of the European Commission, which from that moment onwards would be in charge of arranging co-operation in the realm of external border control and propose the creation of common structures for the control of the EU external borders.

Against this backdrop, the Commission released its key communication of May 2002, which established the mechanisms to achieve an integrated border management (COM(2002) 233 final). An entire section of the document was accordingly dedicated to the establishment of a common policy on the management of external borders. The EU supranational agent had here already acknowledged that the real future challenge to establish such a common policy would be to co-ordinate the different involved national authorities on the ground. Further set

objectives were: the establishment of a common legislative corpus on the matter; a common mechanism for co-ordination and operational co-operation among MS; the release of common integrated risk analyses; the creation of a staff and inter-operational equipment; and finally, burden-sharing between MS.

The policy framework, which Frontex's activity is ultimately embedded in, is unavoidably intertwined with the notion of IBM, a notion that scholars had criticised already in the early 2000s for its vagueness and obscure language (Jorry 2007, 7ff.). In the Commission's 2002 communication (COM(2002) 233 final), the notion of IBM was indeed unspecified. It stood for 'security patterns' that should eventually result in a common EU framework on the matter of external border control. The 2002 communication was also the first document to advance the ambitious idea of a 'European border guard' to be established within the 'common policy' for external borders. At that time, the Commission had planned to establish such a European border guard as an additional structure to the External Borders Practitioners Common Unit. According to this first proposal, while the Common Unit would have been the central steering body of SCIFA+ for integrated border management, the envisaged 'European Corps of Border Guards' would have acted under the operational command of the Common Unit, providing support for the work of national services. Before the establishment of Frontex, only the Common Unit was responsible for carrying out risk analyses, co-ordinating operational projects and carrying out a common strategy for co-ordinating national policies.<sup>135</sup>

The Commission had initially also tried to propose the establishment of a common 'European border police', an idea that the EU Executive had picked up from suggestions made by Italy and further supported by Belgium, France, Germany and Spain. At the same time, the UK and Scandinavian countries expressed reluctance on such a project. In the end, the EU primary principals agreed on a more moderate solution during their JHA Council meeting of June 2002, namely the aforementioned Common Unit (Jorry 2007, 7ff.).<sup>136</sup>

Another important step towards the establishment of the IBM was the Council's document of 13 November 2003, which highlighted the content of *ex* Article 62 of the former Treaty establishing the EC (the Nice Treaty), which became Article 77 in the Treaty of

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<sup>135</sup> Further details are outlined in the summaries on EU legislation available online under <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133205> (last accessed on 10.05.2019).

<sup>136</sup> For more details see the Council's document on the "Plan for the management of the external borders of the Member States of the European Union" available online under <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010019%202002%20INIT> (last accessed on 3.3.2018).

Lisbon.<sup>137</sup> Back then, Article 62 foresaw the establishment of common rules “as to the standards and procedures to be followed by Member States when controlling the external border” (Council of the European Union 2003f, 4ff.). This was a necessary condition to create the planned IBM at the European level, which in turn was an essential prerequisite for the establishment of the AFSJ itself. Before the establishment of Frontex, common rules were applied at an operational level by the competent national authorities of the single MS that were subject to the Schengen *acquis*. Reports discussed within the Council showed however that an application of these common rules without their previous harmonisation was leading to sub-optimal effects and that the Union was not able to ensure at all external borders the same level of surveillance (*ibid.*).

In a further 2003 document, the ‘first’ intermediate principal, the Council, stated that the development of the policy and legislation on external border control and surveillance would remain “a responsibility of the EU institutions, in particular the Council”, thus highlighting the strong intergovernmental character of the policy area (Council of the European Union 2003g). Hence, the responsibility for the management of the external borders would still lie with Frontex’s primary principals, whereas the agency would promote co-ordination among them and provide them with technical, operational, as well as training assistance (Council of the European Union 2003h).

In the light of these discussions, the creation of a new institutional body appeared as the best solution to increase co-operation between national authorities. The new agency would neither be a policy maker nor would it be entitled to make legislative proposals, which is the task exercised only by the Commission as a supranational agent of the EU legislators (and indirectly of primary principals). Prior to the debate on possible institutional forms in charge of developing an IBM, discussions continued on the definition of this concept. In 2005, some EU countries, i.e. Austria, the Benelux countries, France, Germany and Spain, tried to solve the challenges related to the establishment of a future IBM by meeting separately and establishing the so-called ‘Prüm co-operation’. On this occasion, these MS signed a specific Treaty that aimed at speeding up co-operation in the fight against terrorism, illegal immigration, and trafficking. The Prüm co-operation and the subsequent Prüm Convention (2005)<sup>138</sup> represented a parallel event competing with EU’s efforts in trying to establish a common system for the control of the external borders. The Convention has been therefore

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<sup>137</sup> The wording in Article 77 of the Lisbon Treaty changed, stating that the Union should develop a *common policy* rather than just common rules.

<sup>138</sup> For further details on the Prüm Convention see the Council’s document available online under <https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/prumtr.pdf> (last accessed on 11.11.2018).

described as a form of *differentiated* integration (e.g. Leuffen, Rittberger, and Schimmelfennig 2013; Stubb 1996; Tekin 2017), ultimately challenging the EU and its integration goals. Only lately, the EU institutions have managed to officially define the IBM notion in detail in Frontex’s regulation of 2016 (as outlined in section 4.1).

Ever since the Tampere Council of 1999, the AFSJ started taking over elements from the JHA realm, eventually becoming a comprehensive policy area enshrined in Title V of the Treaty of Lisbon. Title V comprises several articles on border control management. According to Article 67(2) of Title V TFEU, the Union “shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country-nationals”. Chapter 2 of the mentioned Title V is then completely dedicated to policies on *border checks*, asylum and immigration (Articles 77 to 80). All three issues are closely intertwined and should accordingly advance at the same pace. The border control policy area is a shared domain between primary principals, intermediate principals and multiple agents, all actors affecting the policy- and decision-making in this realm.

After the 2016 reform, Frontex continues to act under the overarching AFSJ, although its core activities touch also upon other relevant policy areas such as the Common Security and Defence Policy. The close link between the agency’s activity, the policy area it acts in and security issues allows to reduce the agency’s activities to one main objective, namely the securitisation of the EU’s external borders (e.g. Léonard 2009, 371ff.). The ever-present relevance of security and the intensifying activity of the border agency in a policy realm tightly intertwined with security issues, resulted in the growing dependence (and reliance) of primary principals from supranational institutional bodies and solutions. The objective of introducing an official IBM was finally enshrined in Article 77 TFEU, including the ‘security-border management’ nexus. Since Article 70 of Title V TFEU defines EU MS as participatory to the evaluation process of the implementation of the AFSJ, the Council may, based on a proposal from its supranational agent, the Commission, adopt specific measures whereby MS, *in collaboration with the Commission*, “conduct objective and impartial evaluation” of the mentioned implementation. Hence, both primary and intermediate EU principals as well as agents are in charge of monitoring the correct implementation of the AFSJ.

Academia spotlighted from the start the inter-institutional struggles between European and governmental actors to gain control over border control issues and consequently, over the

border control agency (Ekelund 2014; see also Trauner 2012). The dynamic development of the JHA and the entry into force of the Treaty of Lisbon called later on for amendments to Frontex's establishing regulation, in order to adapt it to a new policy structure under continuous change. JHA agencies as Frontex had been initially "designed to consolidate the predominance of member states in the AFSJ" (Trauner 2012, 785). When agencies started mushrooming in the JHA realm in the early 2000s, the Council was initially the dominant principal of these agencies limiting the role of other intermediate principals as for instance the EP (Dehousse 2008; see also Trauner 2012). The fast series of events determining the continuous development of the AFSJ would however progressively change the power relations in the border control sub-policy. These changes would not have been possible without the disintegration of the three-pillar structure introduced by the Treaty of Lisbon.

Besides abolishing the former pillar structure, the Treaty also extended the COD, involving both the Council and the EP, to the former third pillar, which included JHA related issues. Subsequently, opt-outs were negotiated in this area by some countries, i.e. Denmark, Ireland and the UK, whose separate positions (which are outlined in detail in sub-section 4.2.2.1) were reflected in the preparation documents to Frontex's establishing regulation as well as in the membership of the agency's MB (Lavenex 2014, 372).

This dissertation argues that specific spatial and institutional conditions need to be given for a significant agency empowerment to be triggered by a crisis. The interdependencies between MS in the area of border control have tightened through Frontex's activity ever since the introduction of the IBM. The element that is therefore theorised to be essential for the mechanism to play out and hence for primary *and* intermediate principals to significantly empower the agency, is related to the assistance that the agency offers in the border control sub-policy. The linkages or 'interdependencies' between the different actors of the EU system are closely intertwined with the activity and know-how that certain bodies perform and develop over time in a specific policy. "Frontex has always had to act in an extremely politicised environment" (Rijpma 2016, 27) and the perception that principals have of their agent determines the reputation and status that the agent achieves in its specific environment (Wood 2017).

The activities of the agency as well as its overall development were and still are affected by a broad spectrum of internal changes (e.g. change in policy priorities, increase in the annual budgetary allocation) and external developments (e.g. geopolitical events registered in neighbouring countries that give rise to high migratory flows). As a corollary of these internal

and external transformations, the creation of the new EBCG seems to be the result of multiple (inter-)actions as well as of a specific spatial and institutional context. The relevance gained by Frontex over time in the eyes of its primary principals played an essential role for the upgrade of the agency. MS acknowledged that they would not be able to go back to a time *ante* Frontex thus signalling their dependence on the agency's work, especially in the South of Europe. In an ever integrated as well as uncertain sub-policy context shaken by crisis, national solutions are no longer an option and Frontex's primary principals cannot renounce to the support of the agency in border control related matters. Furthermore, the challenges faced by the EU during the migration crisis "heightened security concerns", which in turn triggered "the further Europeanisation of border management" (European Parliament 2018b, 1 and 4). Frontex's role is to provide an IBM at the external borders of the EU, a task that is listed as a fundamental component of the AFSJ in the Treaties and that is indispensable for the good functioning of the Schengen area.

Frontex (and JHA agencies in general) operates in a policy field that touches upon sensitive issues involving not only the sovereignty of MS, but also civil liberties and human rights (e.g. Ekelund 2014; Trauner 2012). The development of the AFSJ together with new external challenges at the EU borders demanded soon for a revision of Frontex's mandate. Especially in 2007 and throughout 2011, the agency attracted "significant media attention" (Ekelund 2014, 100), because of its activity in the Canary Islands (Carrera 2007), and later on for its involvement in the Libya crisis (2011). 2011 marked an important year during which the border agency started experiencing major changes in its remit. The 2011 amendments were a relevant stepping stone towards the reform of 2016. The next sub-section presents the main identified trigger that allegedly led to the creation of the new EBCG and hence to the significant empowerment of Frontex: the Schengen crisis.

#### ***4.2.1.2 The Trigger of the Causal Mechanism: the Crisis***

Between 2015 and 2016, the unprecedented influx of refugees trying to reach the EU caught the MS unprepared and revealed three major weaknesses within the European system.

First, the failing *de*-politicisation of migration related issues including the hurdles that the sharing of competences in the related policy still involves. Second, an insurmountable cleavage between Western and Eastern European countries, which added up to the existing chasm between a wealthy North and an economically weak South. Third, the strong wave of Euroscepticism that flooded numerous MS starting with the Euro crisis and exacerbated by the Schengen crisis. Specifically, Northern European countries had agreed to co-operate in



border control policy in the hope to spread their own border practices to ‘weaker’ states and prevent illegal immigration, while Southern European MS were reliant that supranational cooperation, mainly through the border control agency, would allow them to get access to the northern resources (Parkes 2015).

The crisis that had broken out in 2011 at the EU borders as a direct consequence of the Arab Spring was different from the migration crisis of 2015-16. During the latter, the Central and Eastern Mediterranean routes were the ones most tragically hit by the massive waves of migrants. The reception systems of frontline MS such as Greece and Italy were incapable and unprepared for such a challenge. The EU was in need of a “more targeted, more focused and more solidary” approach, which the Agenda of 2015 sought for the first time to officialise on paper (Interview with Frontex Expert 2 2018). Through the Agenda on Migration, the Commission did not only aim at tackling contemporary problems faced by frontline MS, but also at enhancing relations with transit and origin countries in a long-term perspective. The related external dimension of the AFSJ in general and the border control policy in particular have grown in importance over the years. Not only have MS and existing EU bodies increasingly worked with third countries in migration related matters, but also new structures were created for this purpose (e. g. the European Regional Task Force, in short EURTF).<sup>139</sup>

The role of EU multiple agents, i.e. the Commission and the institutional bodies orbiting around it, expanded during the crisis. The 2015 Agenda on Migration was the impressive initiative of the supranational agent and principal to Frontex to take concrete steps, while other institutional actors were turning to the EU executive machinery and its expertise. Simultaneously, intermediate principals became also active. In 2014, the JHA Council of ministers exhaustively discussed the security of the EU external borders and the steps the EU and its MS should take for an effective management of migration flows. The main goal was to elaborate a comprehensive and coherent response to the crisis that was looming at the external borders of the EU. On this specific occasion, the Council asked the European Commission, the EEAS as well as both migration agencies Frontex *and* EASO to closely monitor the situation at the border and inform the ministers about the next developments. This invitation bestowed great responsibility on the EU multiple agents and allowed them to influence further

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<sup>139</sup> Task forces have always been an additional key instrument of the EU to handle emergencies related to migration. A famous example in this regard is the Task Force Mediterranean (TFM). A few days after the tragedy of 3 October 2013 when 500 migrants drowned off the coast of Lampedusa while desperately trying to reach the EU, the JHA Council set up the mentioned TFM (COM(2013) 869 final), fully endorsed by the European Council one year later. One of the top priorities of this additional structure was to prevent further losses at sea and therefore “to engage with non-EU partners in order to avoid that migrants embark on hazardous journeys towards the EU.” (European Council 2014, 3).

decision-making by identifying risks, trends and accordingly proposing possible solutions. During the 2014 JHA Council meeting, ministers further called (once more) for the *reinforcement* of Frontex's border surveillance operations (Council of the European Union 2014a). As in the border agency's establishing phase in the early 2000s, the exact definition and follow-up implementation of such a reinforcement was handed over to the initiator of the legislative, the European Commission. An essential communication by the Commission promptly followed the Council's meeting a few days later highlighting the steps that needed to be taken in order to achieve an 'open' but simultaneously 'secure' Europe. Frontex and its enhanced role were here mentioned and interpreted as one of these necessary steps, an important measure to better support and assist MS during JOs (COM(2014) 154 final).

The Schengen crisis is the hypothesised cause triggering the mechanism leading to the agency's significant empowerment, whereas the scope conditions for the theorised causal mechanism to play out relate to the policy context in which Frontex operates (as outlined in the previous sub-section 4.2.1.1). The development experienced by the agency in 2016, namely the expansion of its mandate through the establishment of the EBCG as well as the 'remarkable' growth of its capabilities and issue scope since the Schengen crisis are without precedent. These changes are the result of both policy priorities (internal factor) and geopolitical changes (or more specifically the 'geopolitical momentum' as an external factor). In the light of these assessments, whereas the scope conditions correspond to the institutional specificities of the EU system and the particular policy context,<sup>140</sup> the so-called geopolitical momentum and hence the external events that are subsumed under the notion of 'migration' or 'Schengen' crisis are here identified as the cause *triggering* a series of decisional steps that eventually led to Frontex's significant empowerment. During the Schengen crisis, the growing and heightened security concerns in the national territories of the EU MS related to border control issues, played a decisive role in impacting Frontex's reform (e.g. Council of the European Union 2015f, 2; European Parliament 2018b). Nonetheless, irregular migration does not translate into border control alone. Multiple "push and pull factors" determine the work of the agency, such as rescue activities of migrants at sea. As a result, the border agency's growing activity ever since its establishment shaped it into a fast-changing organisation that has transformed from being a "small business to a middle one", its unique know-how augmenting accordingly (Interview with Frontex Expert 1 2018).

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<sup>140</sup> This context "is characterised by very dynamic political, legal and social changes and challenges" (Ramboll Management Consulting and Eurasyllum Ltd 2015, 22).

The context within which the agency acts and its related role have undeniably changed. In this study, I assume that the principals' positions and the decisional rules among them still matter for institutional change to occur, as do the additional positions and actions of the multiple agents involved in the decision-making process.

#### **4.2.2 Principals and Agents towards Significant Agency Empowerment**

In the following, I turn to the distinct positions of principals and agents in the border control sub-policy, in order to lay the groundwork for the analysis of the activities undertaken by multiple principals and multiple agents after the outbreak of the Schengen crisis leading to the border agency's reform. For each identified actor or set of actors belonging to the category of principals or/and agents, the analysis presents their specific positions and how they affected the development of Frontex over the years, focusing on the transformation of the agency into an EBCG.

The following analysis thus outlines not only where these actors' functions lie and where their positions might emerge from, but also how they have contributed to reach the ultimate outcome of interest, namely a significant agency empowerment, by exploring their distinct decision-making steps.

##### ***4.2.2.1 Primary Principals' Positions***

Once the migration crisis broke out in 2015, Frontex's primary principals, the EU MS, played a relevant role in migration policy and consequently in the decision-making process on correlated issues. In order to understand the positions of the primary principals prior to the adoption of the 2016 regulation introducing the EBCG, this part considers the MS' positions and their official statements during the establishing phase of Frontex in the early 2000s as well. Taking into account the former positions of the EU primary principals when they were planning to set up the first European border agency allows to better highlight changes that evolved over time, eventually leading to Frontex's 2016 reform.

The main event leading to the establishment of Frontex were the 9/11 terrorist attacks. The related growing security concerns among EU primary principals can be interpreted as a determinant of consequent institutional change (e.g. Neal 2009). 'Security' is an essential concept when analysing Frontex's role, since the border agency acts at the interface between border management and security within the broader AFSJ. In 2001, primary principals acknowledged the close link between security and strengthened border control co-operation,

by committing to manage better the external borders of the Union, in order to combat more effectively security threats (see also sub-section 4.2.1.1). On this occasion, the heads of state and government concretely asked the Council and the Commission “to examine the conditions in which a mechanism or common services to control external borders could be created” (European Council 2001a, 12). This request of the European Council paved the way for the establishment of the border agency Frontex.

Nevertheless, before agreeing on the establishment of a new supranational structure, primary principals had urged the establishment of the mentioned Common Unit composed of the MS’ heads of border control. The Unit, which was created within the framework of the Council of the European Union, should have co-ordinated measures for the management of the external borders of the MS of the EU (Council of the European Union 2003i; 2003b). This first agreed-upon solution had an evident intergovernmental character and reflected the primary principals’ wish not to grant further authority to the European Commission (or to any other separate body) when it came to border management related issues. Following the European Council’s instructions, the Commission advocated in its 2002 communication (COM(2002) 233 final; for further details see sub-section 4.2.1.1) a common policy of integrated management of external borders, along with the establishment of the requested Common Unit. The Common Unit, which was created under the aegis of the SCIFA, started its work as a Council Working Party in the SCIFA+ formation (COM(2003) 323 final, 7). This was the forerunner of the future Frontex agency.

The Council immediately endorsed the Common Unit, which had to act as head of the common policy on the management of external borders as well as a leader co-ordinating and controlling operational projects. The Council regarded SCIFA as an “invaluable network” for senior officials acting in very sensitive policy fields to reach solutions on interrelated problems (Council of the European Union 2011a, 2). Soon after its creation, however, the effectiveness of the Common Unit started being questioned. In 2003, the Commission and the Council carried out an *ex post* evaluation on the activity that the Common Unit had performed theretofore.<sup>141</sup> The evaluation pointed out the limitations of the Unit, specifically the lack of monitoring mechanisms as well as the absence of a method for independent and thorough evaluation of the work of SCIFA+ (COM(2003) 687 final/2, 38). As a result, primary principals asked for the creation of a new Community operational structure, in order to

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<sup>141</sup> The *ex post* evaluation resulted primarily from a report to the Council by the Greek presidency (Council of the European Union 2003d).

enhance border management in view of the development of a common AFSJ.<sup>142</sup>

The timing here is of particular interest. The terrorist attacks of March 2004 in Madrid (followed one year later by those in London) and the Eastern enlargement with expected consequent migration flows, encouraged both MS (and EU institutions) to take steps towards a common security and border control approach (cf. Argomaniz, 2009). The fast development of the AFSJ showed that security concerns could expedite political and institutional change (cf. Kaunert et al., 2014), leading eventually to the adoption by the Council of the European Union of the regulation establishing Frontex (Council of the European Union 2004g).

The positions of the primary principals and those of the Council partially overlap. Although the Council is considered in the understanding of this study as the *intermediate* principal of Frontex, it is not always possible to clearly distinguish the position of the Council from the positions of the primary principals, i.e. the single MS.

Between January and March 2004, the activity within the Council intensified in preparation to the official adoption of Frontex's regulation. Due to some difficulties encountered by the JHA Council's Frontiers Working Party to resolve four 'substantial' issues, the proposal needed to be further discussed by the SCIFA. The primary principals' major concerns regarded two aspects: (1) whether the agency should have an 'exclusive' competence over the management of operational co-operation at the external borders of the MS; and (2) whether the Commission's proposal for an Executive Bureau should be included in the final text (Council of the European Union 2004c). In their second reading of the Commission's proposal at the beginning of February 2004, primary principals were eventually deadlocked in debates within the Council's Working Party on Frontiers and therefore asked the SCIFA for advice. Concerns about Frontex's main tasks and its related 'exclusive' competence had been mainly raised by the British and Swedish delegations, which asked the SCIFA to consider changes to the proposal, in order to establish that any action taken by Frontex would be "without prejudice to the competence of Member States to take actions in the areas concerned" (Council of the European Union 2004c, 2).<sup>143</sup> Simultaneously, Belgium and Finland further supported national supremacy by requesting that MS should decide on whether or not to participate in the agency's JO, thus having the possibility to launch bilateral or multilateral operations without the agency being involved (Council of the

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<sup>142</sup> For details see the Conclusions after the European Council's meeting in Thessaloniki in June 2003 (Council of the European Union 2003e).

<sup>143</sup> This reservation was extended also to Article 11 *bis* of the proposal, which regulated the exchange of information between the Agency, Europol, authorities of third countries, and competent IOs (Commission of the European Communities 2003a, 22).

European Union - Working Party on Frontiers 2004, 3). The final version of Frontex's establishing regulation did not include any of these national 'sovereignty principles'. By the same token, although Belgium and Spain had requested to delete from the agency's mandate the task to identify best practices on the removal of TCNs, this part was nevertheless included in the final text.

The exclusive competence of the agency was not the only issue that seemed to concern primary principals. Several MS, specifically France, Germany, the Netherlands and Spain, entered scrutiny reservations on the *return* co-operation that the agency would foster and specifically on the financial means available for that purpose. Although this was one of the main drivers for the creation of a border agency in the first place, MS were still jealous of their sovereignty on certain matters (Council of the European Union - Strategic Committee on Immigration, Frontiers and Asylum/Mixed Committee 2004, 7). Two further issues had then been added to the discussion: the participation of Ireland and the UK (both of which are not part of the Schengen *acquis*), and, as a separate matter, the participation of Iceland and Norway.<sup>144</sup> The British and Irish delegations had underlined their willingness to *fully* participate in the activities of the border agency, whereas the Norwegian and Icelandic delegations had entered a scrutiny reservation on the whole Frontex's proposal (Council of the European Union 2004d).

The proposed number of yearly MB meetings raised also reservations among some delegations, which requested four instead of two (as was nevertheless eventually approved in the final text of 2004) meetings a year (Council of the European Union - Working Party on Frontiers 2004, 19). The MB meetings clearly represented another relevant instrument to enhance the primary principals' control over the new agency. During the mentioned readings of the Working Party on Frontiers, the French delegation entered further multiple reservations on the reporting duties of the agency. France was particularly concerned about the transparency and communication of the agency's work as well as the procedural rules about the external evaluation of the agency. According to the initial Commission's proposal, the European Commission 'may' have forwarded to the Council the content of these evaluations

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<sup>144</sup> Both latter countries had to conclude an additional arrangement with the (back then) EC, in order to guarantee their full participation in the agency's activities and still have a special status in relation to Frontex. They are members of the European Free Trade Association (EFTA), which includes also Liechtenstein and Switzerland, and part of the Schengen *acquis*, but they are not members of the EU. For more details about the relationship between the nordic states and the EU see the EFTA Arrangement available online under <http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAAgreement.pdf> (last accessed on 10.1.2019). A further similar arrangement has also been concluded with Lichtenstein and Switzerland and is available online under [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22010A0916\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22010A0916(01)&from=EN) (last accessed on 10.1.2019).

received from the MB. France opposed this wording and suggested that the Commission *should* forward instead the content of these evaluations. Once again, especially the strong regulators among the EU MS (see also Parkes' (2015) evaluation on the Franco-German format shaping co-operation in border control), sought to create tight control mechanisms to maintain their national supremacy over upcoming EU structures.

According to these discussions, Frontex's MB was structured as a "mini Council", representing MS' interests through their respective national border authorities, which however also includes two representatives of the European Commission (Rijpma 2016, 27–28). The intergovernmental MB thus became the highest component of the agency's structure. The MB is in charge of monitoring the agency's activity in advance, before other EU institutions exercise their control, thus representing a joining link between Frontex and its primary as well as intermediate principals.<sup>145</sup>

A final point under discussion prior to the adoption of Frontex's establishing regulation was the future seat of the agency. Hungary, Malta and Poland had already expressed their interest in hosting the seat of the future border agency. The Polish capital was eventually chosen as the agency's headquarters as a EU gesture of reaching out to Eastern partners, in the light of the contemporary Eastern enlargement at that time. Frontex was thus the first EU institutional body to be set up in one of the 'new' MS.

The early 2000s were dominated by interior ministers' increasing 'security-centric' concerns as well as by an overall atmosphere favourable to increasing integration also in the light of the back then still envisaged European Constitution. The EU's primary principals security priorities guided most of the positions in the Council. In order to counterbalance the EU Executive's proposal, clearly differing from their initial intergovernmental solution, i.e. the Common Unit, primary principals had requested that "each Member State should have a representative in the Management Board of the Agency". At the same time, the Council declared that MS would participate in common operational activities, such as joint operations and pilot projects, only on a *voluntary* basis (Council of the European Union 2003h, 5), signalling that MS wanted the agency to follow their national will and disposition.

Eventually, a compromise was reached between the Commission's intent to create a strong regulatory body with (almost) exclusive competence in border control matters and the

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<sup>145</sup> Ever since Frontex's establishment, the link between the MS' border authorities within the agency's MB, and the MS' representation within the JHA Council has been very tight. One interviewee relatedly noted that the MB should not necessarily be considered as a 'new' forum where the national border authorities can discuss on the issues of their expertise in different terms than their JHA ministers (Interview with Frontex Expert 4 2018).

primary principals' concerns to preserve their sovereignty on sensitive issues. The 2004 regulation thus stated that MS "may" continue co-operation with other MS or third countries at the external border "without prejudice to the competencies of the Agency" and only "where such cooperation complements the action of the Agency" (Article 2(2)). Moreover, through the adopted regulation primary principals agreed that they would refrain "from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives" (ibid.).

Despite the mentioned MS' oppositions to the initial text proposed by the Commission, the establishing process of the border agency proceeded relatively smoothly. The impending security threats as well as the failed Common Unit pushed MS to swiftly agree to the establishment of a common border policy and its related agency. Frontex's regulation was back then taken through a unanimous vote (Council of the European Union 2004g). During the adoption, Denmark, Ireland and the UK did not take part in the vote and would therefore accordingly not be bound by the agency's regulation. These three countries have always joined certain *opt-outs* from EU legislation or treaties, which allow them not to participate in specific policy areas.<sup>146</sup> These opt-outs represent special agreements that are the effect of national governments' concerns about maintaining their sovereignty in sensitive issue areas and reflect the 'differentiated integration' characterising the Schengen area.<sup>147</sup> Ireland and the UK have consequently since the Schengen *acquis* retained their internal border controls and adhered on a selective basis "to the flanking measures of the JHA *acquis*" (Lavenex 2014, 372). All three countries (Denmark, Ireland and the UK) thus developed a specific and tailored co-operation with the border agency from the very beginning.<sup>148</sup>

Frontex was established to close technical gaps at the national level and bring together very different national systems of border control into a common one (Parkes 2015, 67). Compared to the former Common Unit, the border agency was given the additional task, "of

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<sup>146</sup> Whereas, generally speaking, Ireland and the UK were exempted from implementing the Schengen *acquis* and legislation adopted in the AFSJ, Denmark maintains four EU co-operation opt-outs, two of them regarding the JHA and AFSJ policy areas because of the Danish Maastricht Treaty referendum in 1993. For a detailed outlook on the more general consequences of specific MS' opt-outs and the broader concept of 'differentiated integration' see Tekin (2014).

<sup>147</sup> In 1992, the Danish electorate had voted in a referendum against the Maastricht Treaty and thus rejected it by a narrow margin. Since the Treaty could not be ratified unless all MS were in its favor, Denmark called for a second referendum in 1993. This time, Danish voters voted for the Maastricht Treaty, however on some specific conditions (e.g. Svensson 1994).

<sup>148</sup> Future possible co-operation after Brexit has still to be negotiated. Up until now, the UK has withdrawn from the EU's civilian missions and agreements linking it to Frontex. For the cases of Northern Ireland and Gibraltar border controls and possible special solutions need to be established yet (Agence Europe 2017a).



coordinating and organising return operations” of MS as well as identifying best practices on the related removal of TCNs from the Union’s territory (Council of the European Union 2003f, 4ff.). The mission of Frontex was thus sealed: it would secure the external borders and prevent illegal intruders from settling down in the EU without permission, in order to benefit its citizens.<sup>149</sup> In order to ease the transition from the Common Unit, which had been essentially an intergovernmental structure, MS’ delegations agreed to the proposal of the presidency of the Council to temporarily allow the agency’s participation in the meetings of the Council Working Parties. The agency would accordingly participate in these meetings “on an ad hoc agenda-driven basis” to discuss issues related to the new competencies of Frontex (Council of the European Union 2005a). The tight ties between the Council, where the primary principals are collectively represented, and the new agency were thus ensured.

Two ever-present problems can be identified in the border control policy in relation to primary principals. First, MS usually lack the will to show mutual solidarity and to engage in responsibility-sharing within ‘core state powers’ issue areas, as the 2015-16 migration crisis has blatantly shown (for instance when looking at the specific tensions between Austria and Greece).<sup>150</sup> Second, MS have often resorted to parallel instruments and fora with partial membership when it came to co-operation for the surveillance of the external borders, which inevitably created the ground for serious overlaps with Frontex’s activity (e.g. the 2005 Prüm Convention; for more details see sub-section 4.2.1.1 on the border agency’s policy framework).<sup>151</sup> Against this backdrop, the development and reinforcement of an IBM co-ordinated by a strengthened supranational European agency appears rather surprising.

Whereas the 2003 and 2004 negotiations preceding the establishment of the agency were evidently dominated by the EU primary principals’ positions, Frontex’s amended regulation of 2011 was not so much the result of the MS’ will but rather the inevitable consequence of a fundamental rights strategy pushed forward by the ‘second’ intermediate principal, i.e. the EP. The main changes to Frontex’ mandate introduced in 2011 regarded the agency’s operational

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<sup>149</sup> For this latter purpose, in 2003 the Council had already adopted an action plan on a Community return policy, behind whose design the Commission was once again the driving force (COM(2003) 687 final/2, 3).

<sup>150</sup> At the beginning of 2016, Greece withdrew its ambassador to Austria as a sign of acrimony between EU countries over the failed Dublin system. For more details see the article of the Financial Times available online under <https://www.ft.com/content/34bdcfb8-dbc7-11e5-a72f-1e7744c66818> (last accessed on 12.2.2019).

<sup>151</sup> The involved seven countries that signed the Convention (i.e. Austria, the Benelux countries, France, Germany, and Spain) aimed at stepping-up cross-border co-operation outside the EU framework. Between 2006 and 2009, other MS joined the Convention with the main objective of combating terrorism and illegal border crossings. The Council adopted parts of the Convention into its 2008 Decision 2008/615/JHA - see Decision 2008/615/JHA, available online under <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:210:0012:0072:EN:PDF> (last accessed on 3.10.2018).

powers. Frontex thus obtained “stronger powers in the co-ordination of JOs” as well as in the deployment of its EBGT (Carrera, Den Hertog, and Parkin 2013, 340). Frontex’s development of 2011 reflects the overall transformations within the EU system, whose predominant intergovernmental character was being progressively substituted by a more supranational one, which found expression *inter alia* in a reinforcement of the EP’s powers. The 2011 amendments had been supported in particular by the Italian government, which at that time had already asked, together with France, for a reinforcement of the border agency (Agence Europe 2011b). However, the MS had not yet specified how such a reinforcement should exactly look like.

The events that led to the agency’s 2016 reform are rooted in 2014, when illegal border crossings at the EU external borders started to challenge the reception and border management systems of some MS. As a result, primary principals were concerned about subsequent security threats. In late 2014, primary principals called, as a first step, on the European Commission to explore possible amendments that could improve the Schengen Border Code and to simultaneously strengthen the resources of the border agency Frontex (Agence Europe 2014). In June 2014, a feasibility study was carried out for the DG HOME evaluating the possible creation of a “European System of Border Guards (ESBG) for improved management of the external borders of the Union, and to address the future role of the Frontex Agency” (Unisys 2014, 6).<sup>152</sup> Whereas MS were cautious about the potential delegation of responsibility towards such a border guards’ ‘system’, some national border management authorities expressed their support towards the further involvement of the EU in border related issues (ibid., 6–7). By the time the feasibility study was published, the primary principals were already considering that long-term rather than mere short-term solutions might have been beneficial in the control of the common borders.

In 2015, interviewed national stakeholders<sup>153</sup> acknowledged the adequate qualifications of Frontex’s staff to carry out the agency’s tasks as well as the agency’s ability to provide national authorities with reliable surveillance information on external borders (Ramboll

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<sup>152</sup> The European Council had already in its Stockholm Programme of 2009 forwarded to the Commission the invitation to debate about the feasibility of the creation of an ESBG. According to the European Council, the Commission should have thus initiated a debate on the long-term development of Frontex (European Council 2009a, 26).

<sup>153</sup> The list of stakeholders interviewed for the 2015 external evaluation included Frontex’s ED Fabrice Leggeri; heads of unit and division’s directors employed by the agency; members of the LIBE Committee; several MS’ representatives sitting in the agency’s MB (in particular Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, France, Germany, Greece, Italy, Norway and Spain); as well as employees working for other EU agencies (e.g. EASO and Europol) and IOs (e.g. UNHCR).

Management Consulting and Eurasyllum Ltd 2015, 168ff.).<sup>154</sup> One of the roles that Frontex carried out best according to the stakeholders' answers, was its primary role in JOs, which offer MS a platform for co-operation and relevant structures for co-ordination to boost their capacity in the management of the external borders. The effective co-ordination of JOs resulted from the agency's role in fostering co-operation between MS. The fact that the total number of both JOs and JROs increased over the years signals the growing primary principals' reliance on Frontex's work (especially with regard to return operations, MS have, increasingly leant on Frontex – see also sub-section 4.1.3).

The new mandate of the EBCG accordingly reflects the primary principals' increased need for support in the management of the EU's common borders. Hence, conversely to the past the reformed Frontex can on its own initiative propose to MS to organise or co-ordinate return operations (Article 28(1) of Frontex's regulation of 2016). Before the reform of 2016, primary principals' decisions had instead limited the effectiveness of the agency on the ground, especially when it came to the pooled resources made available (Ramboll Management Consulting and Eurasyllum Ltd 2015). In October 2015 and in the light of the ongoing crisis, primary principals agreed that strengthening the protection of the EU's external borders was a major priority without however envisaging a new border agency yet. According to the MS' heads of state and government, this goal should have been rather reached through the "full use of the existing Frontex mandate" (European Council 2015b).

In the early months of 2016, those countries that had been most affected by the migratory flows such as Italy, reiterated the importance of reinforcing solidarity within the EU and the related significance of substituting the old Frontex with a new structure. In its document to the Council, Italy further noted that the reform of the border agency was particularly necessary, especially with regard to its reserve pool, since Frontex did not receive a satisfying response to its continuous requests for more personnel while the pressure at the EU's external frontiers was at its peak (Council of the European Union 2016c, 12). Given the lack of supranational solutions to the migration crisis, some EU countries started to turn to unilateral action, which included the closure of their borders. Already in late August 2015, the Hungarian government had decided to close its borders while Austria, France, Germany, Malta, Slovenia and Sweden followed by reintroducing internal border controls (Guild et al. 2015). The reintroduction of internal borders, which had been long abolished, clashed not only with the idea of a common area of free movement, but also with the concept of a common external border management.

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<sup>154</sup> Although the interviews' were carried out with Frontex's employees as well, whose answers might bias the evidence collected towards a more positive assessment of the agency's work, the final evaluation report of 2015 presents the MS' responses separately when elaborating on the findings.

National border authorities nevertheless tried to regain control over matters that should have been dealt with at the supranational level and despite some reforms, the EU response during the migration crisis remained weak because of the diverging positions between MS.<sup>155</sup> Regardless of the prioritisation of migration related issues at the EU decision-making level and the initiatives taken by the Commission (e.g. through the 2015 Agenda on Migration), the very existence of multiple principals within the EU migration policy led in front of the ‘unexpected’ crisis to a deadlock situation.

EU countries remain the undisputed primary principals of the whole EU system, especially in policy areas as the one related to border control, where ‘core state powers’ are involved. The specific character of the EU system does not allow to separate the MS’ will and positions from the supranational decision-making process nor can the EU institutions be regarded as completely independent from the national governments they represent. It would therefore be erroneous and unrealistic to regard the EU intermediate principals and multiple agents as completely disconnected or independent from the primary principals, i.e. the EU MS. The important role played by the MS to reach a significant empowerment of Frontex is acknowledged by testing a causal mechanism that exhaustively considers their positions and structure. The fact that MS follow national interests or seek to protect their sovereignty in sensitive issue areas, however, does not exclude that EU bodies as Frontex have significantly enhanced their power. The enhanced presence of the border agency on national territory since the 2016 reform (e.g. through its liaison officers) did not find a strong opposition among primary principals.<sup>156</sup> The agency’s added value has been acknowledged by all national border authorities, since it allows them to better predict on migratory flows and to enhance the MS’ capacity to face them (Interview with Frontex Expert 3 2018).

Against this backdrop, after having outlined the positions of the border agency’s primary principals during the different delegation phases since the early 2000s, the next sub-section turns to the role of the European intermediate principals and multiple agents in the process that allegedly led to a significant agency empowerment.

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<sup>155</sup> Carrera et al. (2015) offered an interesting overview in this regard.

<sup>156</sup> Despite the heated debates between Eastern countries such as Hungary and Poland and the rest of the EU MS, Hungary was for instance always supportive of having Frontex’s help when it comes to the control of its national borders.

#### *4.2.2.2 Intermediate Principals' and Multiple Agents' Positions*

Given the main assumption of this dissertation that the Schengen crisis triggered a significant agency empowerment, one of the most essential parts of the theorised causal mechanism is the further interplay between the EU intermediate principals and multiple agents. After the entry into force of the Lisbon Treaty in 2009, the introduction of the COD as the ordinary legislative procedure shifted decisional power between intermediate principals (more details follow in the upcoming sub-section 4.2.3). This part outlines the main positions of these actors starting from the years immediately before the establishment of Frontex until the migration crisis of 2015-16.

The initiator of the process leading to the creation of Frontex was back in 2002 the supranational agent to the EU legislators and future principal to the border agency, i.e. the (back then) Commission of the European Communities (EC) (COM(2002) 233 final). At this point in time, whereas in the short term the Commission foresaw the creation of an external border practitioners common unit bringing together all involved national authorities responsible for the protection of EU borders, in the medium term the supranational agent decided to take measures for the establishment of a “European Corps of Border Guards” (ibid., 12). The initial idea of the European Commission to create a ‘European border police force’<sup>157</sup> or a European corps of border guards (European Commission 2002a, 21), which was primarily supported by Southern European countries,<sup>158</sup> was however set aside and primary principals agreed within the Council on the more moderate solution of having a border agency. The proposal for the creation of an agency that would flank and in the end replace the Common Unit was presented in the Commission’s 2003 proposal (COM(2003) 687 final/2). Although the Commission had tried, already back then, to push for a stronger version of the border agency – a unified, hierarchically organised, “autonomous and somewhat militarised single agency (Caparini and Marenin 2006, 17) –, the times were not ripe yet for such a project, which became viable only years later. In the early 2000s, the EU Executive was thus not able to successfully address “the real political tensions” among primary principals. Specifically, the tension had raised between the Italian interior ministry, which was “tired of

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<sup>157</sup> The European Border Police Force envisaged in the Commission’s document would have been a polycentric system with specialised centers on the territory of each participating MS. Germany’s strong support for the idea of a European Border Police Force came from the former Justice and European Affairs Minister of Brandenburg, Kurt Schelter, who had been also one of the major architects of Schengen (Bort 2006, 225).

<sup>158</sup> In particular, Italy had been entrusted to carry out a feasibility study on the creation of such a European Border Police Force. The study was further promoted by Belgium, France, Germany and Spain (“Feasibility Study for the Setting up of a ‘European Border Police Force’ - Final Report” 2002).

bearing the brunt of immigration to the bloc” and Austria, the Benelux countries, Germany and Spain, which wanted instead an organisation to increase their control over the southern borders (Parkes 2015, 64).<sup>159</sup> Hence, based on the general request made by the European Council,<sup>160</sup> the Commission suggested to create an *agency* as an alternative solution to the deficient Common Unit (COM(2003) 323 final, 7–8) and presented in 2003 its proposal for a Council Regulation establishing a European Agency for the Management of Operational Cooperation at the External Borders (COM(2003) 687 final/2). The proposal stressed that the choice to establish an ‘agency’ rather than any other institutional form was due to the “clear need for creating an independent, *specialised* Community operational structure”. The document emphasised further that “the Agency will be in a better position than even the Commission itself to accumulate the highly technical know-how on control and surveillance of the external borders” (ibid., 7 [emphasis added]). This proposal revealed already the strong influence of the EU Executive – in its double role as both a supranational agent to the Council (and to the EP as well) and a (third intermediate) principal to the agency – on the establishment and mandate of Frontex. According to the Commission’s proposal of 2003, the envisaged agency for the management of the EU’s external borders would thus not only be an independent and depoliticised structure, but also a specialised one with a high expert status. After an *ex ante* evaluation, the Commission claimed that creating an agency was “a better and more cost-effective choice for achieving the objective” of an enhanced operational cooperation between MS at the EU external borders than any other alternative examined (namely either a reinforced Common Unit or an empowerment of the Commission itself) (COM(2003) 687 final/2, 38).

Before the Council could adopt as the agency’s *first* intermediate principal Frontex’s founding regulation, the proposal had to be subjected to numerous readings by different committees.<sup>161</sup> Coreper as well as more than 150 highly specialised working parties and committees, also known as the ‘Council preparatory bodies’, supported the work of the Council during negotiations on the future border agency. In 2003, the JHA Council eventually

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<sup>159</sup> This was, with the exception of France, almost the same bloc of states that signed the Prüm Convention in 2005.

<sup>160</sup> During its meeting in Thessaloniki in June 2003, the European Council had invited “the Commission to examine in due course, drawing on experience of the Common Unit activities, the necessity of creating new institutional mechanisms, including the possible creation of a Community operational structure, in order to enhance operational cooperation for the management of external borders” (Council of the European Union 2003e, 4).

<sup>161</sup> The documents issued by these bodies are of particular interests because of the national delegations’ statements they include.

endorsed the Commission's proposal for the establishment of a border agency and added that "[p]ossible extensions of the tasks of the Agency should be decided, at an appropriate moment, according to the procedure provided by the appropriate legal basis in the treaties." (Council of the European Union 2003a, 9ff.). Frontex's intermediate principal seemed thus to already pave the way for a future upgrade of the border agency's mandate. At the same time, it also stressed that the further development of policy and legislation on external border management would remain "a responsibility of the EU institutions, in particular the Council" (ibid.) and that the border agency should closely co-ordinate with these institutions.

Upon the Commission's initiative, the Council adopted (alone) the proposal in 2004 and Frontex became officially operational the following year. The agency should have been a solution to the multiple security problems that the EU had to endure (terrorism, illegal immigration, and human trafficking) while always fully respecting human rights. Frontex's mission eventually combined both the position of the Council and the Commission on one side (security focus) and the position of the EP on the other (human rights focus) (see also European Commission 2005).

While the European Commission sought to exploit the primary principals' inability to secure the external borders and get its 2003 proposal for a border agency adopted, the EP was still moving its first steps towards institutional ownership and identity (Parkes 2015, 59). The Commission had adopted a security-oriented approach in order to prove to its principal, the Council, that this was the right solution to achieve common goals, whereas the EP advocated a more human rights-oriented approach. Back then, the Council had to follow the consultation procedure and the EP had been accordingly only marginally involved in the establishing process of the agency. Consequently, the Council, as Frontex's *first* intermediate principal, delegated powers to the agency on behalf of the primary principals, without the EP being yet a co-legislator in its full right. In this initial phase, the demands of the EP on the development of the border agency were eventually mostly ignored by the Council despite the consultation procedure. This can be charted in the EP's report on the Commission's proposal, issued before the official adoption of Frontex's establishing regulation (European Parliament 2004). This report was characterised by a more human rights and civil-oriented position compared to the rather 'national' and intergovernmental approach of the Council. The Commission's proposal had emphasised the 'security element', echoing the widespread interpretation that the protection of the EU borders is a corollary to the free movement of people and the security of EU citizens (COM(2003) 687 final/2). While the EP acknowledged the importance of security and securitising practices, it introduced amendments stating that the aim of border

surveillance should be first and foremost the prevention of trafficking in human beings (European Parliament 2004, 6). By the same token, the EP further maintained that the agency should not provide to national officers any training and seminars related to the removal of TCNs illegally residing in the MS nor should it organise and co-ordinate return operations (a position closer to the one taken by primary principals; see previous sub-section 4.2.2.1). Hence, in 2004 the Parliament was eager to circumscribe the future border agency's remit as much as possible (European Parliament 2004, 6ff.). The position of the EP against *any involvement* of the agency in return operations remained however eventually unheard. An exception in this regard was the proposed recital 19, which was successfully deleted after the EP had called on the Commission to amend it. The initially proposed recital should have provided for a potential gradual widening of the *scope of action* of Frontex (e.g. carrying out inspections at the external borders and facilitating operational co-operation with relevant third countries and IOs), because of the constantly changing challenges the IBM would have struggled with in the near future.

Before the introduction of the new legislative procedure in 2009, institutional imbalance and different political weights dominated the EU. As a result, only some minor amendments advocated by the EP were adopted in the final version of Frontex's establishing regulation, while most of them were not.

Right after Frontex was established, the Commission foresightedly stressed that given a wider and more heterogeneous EU in the aftermath of the Eastern enlargement of 2004, MS would no longer be able to tackle independently the challenges posed by the management of migration flows (COM(2005) 123 final). Hence, a common policy of integrated border management should have been strengthened to address this challenge in a co-ordinated manner. Ten years before the migration crisis broke out, the Commission had already tried to address the crucial question of how the principles of solidarity and shared responsibility in managing migration flows could be implemented (ibid., 4). The supranational agent also foresaw that the burden of patrolling the EU's maritime border would primarily fall on six MS (Cyprus, France, Greece, Italy, Malta, and Spain), whose territories comprise long maritime borders in the Mediterranean and South-West Atlantic.<sup>162</sup> Therefore, given the

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<sup>162</sup> Whereas the costs for border control and the management of the EU external borders were presented and listed extensively in the Commission's staff working document, the data about costs that MS would have and had to bear to support their asylum systems were "difficult to get", due to their highly political character (COM(2005) 123 final, 7–14). Moreover, already back then the three countries that had to bare the highest costs for patrolling the external border of the EU were Greece, Italy and Spain.



changing times and the failed project to create a European corps of border guards, the Commission chose the additional establishment of an ‘External Borders Fund’, i.e. a “financial solidarity mechanism” aimed at supporting those MS that would have been burdened the most when it came to border control. By calling for such a fund, the Commission had recognised the cleft between the less and the most vulnerable MS (the ‘strong’ and ‘weak’ regulators as defined by Ripoll Servent (2018)), a cleft that would show its damaging effects during the emergency of 2015-16. Frontex has always played an important part in the implementation of the mentioned fund, which became complementary to the agency’s work in providing financial means for JOs, pilot projects, and training of border guards co-ordinated by Frontex (COM(2005) 123 final, 24). Relatedly, the Commission had further suggested in 2005 to already “expand the budget and extend the role” of Frontex, since this would allow to overcome problems related to the dependency of the agency on MS’ voluntary funding (COM(2005) 123 final, 20).

After having started its activity, Frontex was soon confronted with challenges on the ground (mainly related to the protection of fundamental rights) that would catch the attention of its (primary and intermediate) principals and call for amendments to its mandate. The border agency’s mandate was consequently (partially) amended twice in 2007 and 2011, but not in the extent and depth introduced by the latest reform, which represents the actual focus of this analysis.

The first amendment to Frontex mandate of 2007 followed the criticism raised by public opinion and NGOs against the agency’ operations in Southern Europe.<sup>163</sup> Such necessity stemmed primarily from the human rights protection gap in Frontex’s mandate, which the agency’s operations had revealed. By proposing amendments to Frontex’s existing mandate, the Commission did not (again) act as a mere supranational agent, but also as an intermediate principal to Frontex deciding upon the agency’s development. As a result, the further two intermediate principals, the EP and the Council, adopted jointly Regulation (EC) No 863/2007 (following the consultation procedure), which established a mechanism for the creation of the mentioned RABITs. At this point in time, power relations among the intermediate principals had already started to change, foreseeing an increasing role for the EP deciding jointly with

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<sup>163</sup> The sudden wave of scepticism and disapproval of the border agency’s work was primarily related to the inconsistency of a de-politicised body working in a highly political environment (Carrera 2007, 9). A revision of the agency’s mandate thus became necessary after ‘dubious’ activities regarding the return of irregular migrants from Western Africa to the Canary Islands through three operations (named HERA operations, carried out between July 2006 and April 2007 to assist Spain).

the Council on the agency's structure (Parkes 2015, 65). Further amendments to Frontex's mandate going in a similar direction were introduced in October 2011. The amendments of 2011 were more extensive than the slight changes introduced in 2007. Nevertheless, times were not ripe yet for an overall reform, although the number of illegal entries to the EU had increased after the Arab Spring and Libyan war of 2011.

More than a decade later, in 2016, the Council and the EP brought the EBCG agency to life. Frontex's intermediate principals have experienced an increasing expansion of their competences in migration governance ever since the abolition of the mentioned three-pillar structure (introduced with the Treaty of Maastricht and dismantled by the Treaty of Lisbon). At the same time, the EU multiple agents, and especially the European Commission, always tried to push for a further transfer of competences to the supranational *executive* level. Since the early 2000s, the European Commission had been in favour of a strong institutional structure to control the EU common border. As for Frontex, the border agency had repeatedly suggested an enhanced role of the EU in the external border control area and hence advocated a strengthened mandate for itself through the acquisition of more responsibilities, especially for the management of pressure situations (Unisys 2014, 7). Such a development should have been further accompanied by a stronger engagement of the EP in the accountability process.

Over time, the influence that primary principals could exercise on border control related issues has been increasingly limited by the growing powers gained by Frontex's intermediate principals, i.e. the two legislators as well as the European Commission, the latter resorting to its right of initiative in order to influence decision- and policy-making. A paramount example of the European Commission's influence on migration matters was the action plan it had issued in 2010, right after the official adoption of the Stockholm programme by the European Council. In this plan, the Commission had highlighted its leading role in the adoption of the programme and claimed thus ownership of this document (COM(2010) 171 final, 2). The programme maintained, among other things, the essential precondition of the two sub-policies of border control and asylum advancing conjointly for a common migration approach to be achieved. In 2009, the Commission had further called for a reinforcement of the border agency through the strengthening of its operational capabilities and the possibility of own resources (COM (2009) 262 final, 18). The Stockholm programme was thus a momentous document, since it represented one of the first official attempts of the EU Executive to push for an expansion of the border agency's mandate and its consequent reinforcement.

Whereas during the previous strategic programmes adopted in Tampere and the Hague an

intergovernmental attitude prevailed due to the ‘classic’ structure of the JHA (Carrera and Guild 2012, 2), the Stockholm programme was adopted after the Lisbon Treaty under a new institutional pluralism that envisaged a wider involvement of the EU Executive and the EP. The increased role of the EP according to the COD, the introduction of QMV within the Council for most issue areas, and the greater involvement of national parliaments should have ensured a correct and swift implementation of new agreed priorities (COM(2010) 171 final, 2). The 2009 Stockholm programme was the last ambitious JHA programme adopted for the establishment of the AFSJ, which eventually led to a dispute between two of Frontex’s intermediate principals, that is the Commission and the Council, about the next steps that should have followed the programme (Carrera and Guild 2012; Lavenex 2014). Back then, these two institutions were not only divided about ‘who’ should be in charge of defining the legislative agenda for the AFSJ, but the Council also openly criticised the Commission for going beyond the wording of the programme in its action plan of 2010 and for not fulfilling specific commitments (Lavenex 2014, 375). The 2010 Stockholm Plan issued by the Commission was consequently defined by “several Council representatives as an act of provocation and even as a shameful practice” (Carrera and Guild 2012, 3).

Moreover, in 2012 the supranational agent did not issue on time a mid-term evaluation of the Stockholm programme’s implementation as previously agreed (European Council 2009a, 7). The missed deadline created the space for the EP to announce that it would issue a personal mid-term evaluation on the matter.<sup>164</sup> Hence, in April 2014 the EP took the opportunity to call through this report for the role of Frontex to be reinforced. The EP thus endorsed the strengthening of Frontex, “in order to increase its capacity to respond more effectively to changing migration flows” (Paragraph 79 of the EP’s Report of 2014 on the mid-term review of the Stockholm programme) and thus echoed the European Commission’s position, which had always stood for a reinforcement of the border agency.

These examples highlight the constant competition that intermediate principals are involved in when trying to define and implement the needed political steps to reach an integrated AFSJ. It also demonstrates how EU institutions use specific impasse situations or breaches in the policy-making to bring forward their positions. On the one side, each of the legislators, both the Council and the EP, seem to claim its ‘ownership’ of policy priority-

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<sup>164</sup> The announced report was published by the EP in 2014 and was already written in the shadow of the approaching migration crisis. For further details see the EP’s report on the mid-term review of the Stockholm Programme available online under <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0153+0+DOC+PDF+V0//EN> (last accessed on 3.3.2019).

setting and turn to the European Commission when these priorities need to be put into action. On the other side, the Commission has grown in the last decade a remarkable influence on the development of the AFSJ sub-policies by using its sole right of initiative<sup>165</sup> and by expanding the executive power through the creation and reinforcement of agencies. The creation of Frontex was the first step towards an increasingly shared border control policy. Through the agency and the support it would provide to MS, the European Commission strategically expected to increase the role of the EU executive machinery by providing a “higher quality of expertise” as well as reliable supranational assistance (Parkes 2015, 63 and Boswell 2012 on political uses of expert knowledge). Although in order to address emerging security challenges, the Commission had numerous times in the past already called for a reinforcement of Frontex, a significant change could only be achieved once a pressing emergency broke out on EU territory in 2015.

Intermediate principals have always followed different agendas in the border control sub-policy (Parkes 2015). Even the process that led to the reform of Frontex into a new EBCG was characterised, once again, by the EP on one side engaging in the fight for the protection of human rights and the Council on the other side, interested in reinforcing the protection of the EU’s common external borders following primary principals’ positions.

In 2014, for instance, after the dramatic increase in the deaths of migrants in the Mediterranean Sea, the EP advanced new rules to clarify the details for rescue at sea operations co-ordinated by the border agency Frontex (European Parliament - Liaison Office in the United Kingdom 2014).<sup>166</sup> Accordingly, Frontex’s units would have a duty to save lives (European Parliament and Council of the European Union 2014). In the first phase of the migration crisis, evidence suggests that the EP took legislative initiatives to bring forward its human rights-oriented approach and that, given the extent of the crisis, the other intermediate principal, i.e. the Council, eventually agreed to measures that would prioritise rescue at sea of migrants. Notwithstanding that the EP had called for enhanced controls and more reporting duties for the agency in its co-ordinated operations, the 2015 draft proposal for a new EBCG

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<sup>165</sup> Besides the European Commission having the sole right of initiative according to Article 17(2) TEU, the EP has an indirect right of legislative initiative (Article 225 TFEU). It can consequently ask the Commission to submit a proposal, although the Commission can in turn reject the EP’s request by merely informing it about its reasons. The same is valid for the Council, which can also request the Commission to submit a proposal (Article 241 TFEU). A further possibility is the European Citizens’ Initiative introduced by the Lisbon Treaty, which allows a certain number of EU citizens to invite the Commission to submit a specific proposal (Article 11(4) TFEU and Article 24(1) TFEU).

<sup>166</sup> The final regulation that was eventually adopted (that is Regulation No 656/2014, which was mentioned in sub-section 4.1.3 analysing Frontex’s issue scope) also defined those ‘emergency phases’ during which SAR operations should be carried out.

presented by the Commission focused more on an expansion of the agency's operational powers and resources rather than its limitation through more constraints. In March 2015, the European Commission had already announced that it would present a "global approach on migration" – i.e. its comprehensive agenda on migration of May. This approach was consolidated on four priorities: (1) the improvement of the European asylum systems, entailing a reform of the Support Office; (2) strengthening Frontex and its budget; (3) creating new legal migration channels; and (4) the fight against illegal immigration and human trafficking by co-operating with third countries of origin and transit (Agence Europe 2015a). Before issuing the agenda in May, the Commission had also presented a ten point action plan<sup>167</sup> at a joint meeting of foreign and interior ministers in April 2015. The first point of the plan, which was also reiterated in the official agenda on migration in May, envisaged a reinforcement of the JOs *Triton*<sup>168</sup> (which had replaced the Italian *Mare Nostrum* operation)<sup>169</sup> and *Poseidon* in the Mediterranean, by increasing budgetary resources and the number of assets at Frontex's disposal. This first point further called for an extension of the JOs' operational area within the mandate of Frontex. At the same time, Frontex itself kept reiterating that a successful border management capacity could only work with adequate economic and personnel resources (see also Agence Europe 2015c).

The European Commission thus adopted a comprehensive approach to achieve increased integration as well as the reinforcement of Frontex. Eventually, MS' representatives reached consensus on increasing the resources allocated to the *Triton* operation. However, issues regarding the spatial expansion of the operation as well as the long-term reinforcement of Frontex's mandate were postponed (Agence Europe 2015b).<sup>170</sup>

Border and external security (as well as its unavoidable corollary, namely internal

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<sup>167</sup> For further details see the European Commission's press release on the ten point action plan on migration available online under [http://europa.eu/rapid/press-release\\_IP-15-4813\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4813_en.htm) (last accessed on 12.3.2019).

<sup>168</sup> Towards the end of 2014, EU home affairs ministers had given their approval to the launch of *Triton*, a Frontex Agency operation, backed initially by 21 member states though this number later fell. The mandate of Frontex for this specific operation was however quite limited. The agency was only able to intervene within the 30-mile zone exclusively for border control tasks and not to carry out search and rescue at sea. Planned, in the first instance, for two months, *Triton* was then extended until the end of 2015 by the European Commission; its monthly budget, however, was below €3 million and its fleet consisted merely of two planes, one helicopter and seven ships (see press release by the European Commission available online under [http://europa.eu/rapid/press-release\\_IP-15-4453\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4453_en.htm) (last accessed on 16.4.2019)).

<sup>169</sup> The *Mare Nostrum* operation led by the Italian government was highly debated and ended, because of the lacking support in principle of the other MS. Most of them feared that the operation would have the effect of encouraging more people to try to make the crossing to Europe.

<sup>170</sup> During their meeting in Luxembourg, ministers primarily discussed the *Triton* and *Poseidon* operations, which were both co-ordinated by Frontex, and the enhancement of entailed resources. The former Greek defence minister and since November 2014 Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, was during this event particularly in favour of not only enhancing the resources of both operations, but also of extending the operation zone for *Triton*.

security) were prioritised throughout the 2015 Agenda on migration. Security thus seems to represent the ever-impending background motivation when taking decisions related to immigration. During the migration crisis, the EU Executive picked up yet again the security-centred approach of the primary principals to push for a reinforcement of Frontex. The EP was also key in supporting the European Commission's initiatives. In its resolution of 29 April 2015, for instance, the EP called again upon EU countries to step up contributions to the EU agency Frontex and to show more solidarity (European Parliament 2015).

The identification of the positions of the intermediate principals (which can overlap with the 'agent' category, as in the case of the European Commission) is pivotal to answer the overarching research question of this study and to understand the complex multi-level EU reality. The European Commission, as one of the border agency's intermediate principals, did not only crucially participate in the delegation process establishing and amending the agency's mandate, but it also exercises extensive control over this body by sitting in the MB and being in constant exchange with the agency's staff. Since the Commission represents itself one of multiple agents, it has always tried to enhance integration at the EU level by strengthening the mandate of Frontex. At the same time, it thus sought to expand its own executive range through Frontex's reform. The Commission was the motor of the mechanism leading to the border agency's significant empowerment as the next sub-section on the decision-making shows. It used the sharpened security-centred approach of primary principals and their diverging positions within the Council to propose the EBCG project backed up by MEPs sitting in the European Parliament.

#### **4.2.3 The Decision-Making: A new European Border and Coast Guard Agency**

This dissertation assumes that when a crisis breaks out affecting a specific policy where national authorities share competences with supranational institutions and are consequently dependent on supranational activity and support, primary principals are most likely to resort to politically neutral bodies as Frontex, while intermediate principals grant them increasing authority. This section revolves around the third part of the theorised causal mechanism, namely the decision-making involving the agency's intermediate principals.

Although unprecedented in its severity, the Schengen crisis could be regarded as a *déjà-vu*, since a migration crisis trying the EU system had already taken place in the past as a consequence of the Arab Spring (Carrera, Den Hertog, and Parkin 2012). Back then, in 2011, the border agency had experienced minor changes in its mandate. Against this background,

the question arises of what exactly changed after the Schengen crisis and which specific steps were taken to determine the significant empowerment of the agency.

The second proposition developed in this dissertation (as theorised in section 3.2.1) focuses on unanimous and hence ‘demanding’ decision-making rules. It aims at understanding the decisional steps undertaken by the agency’s intermediate principals to reform Frontex’s and thus determine its significant empowerment. The reasoning behind this second proposition stems from the P-A expectation that unanimous, demanding decision rules are likely to lead to further delegation of authority to the agent, given that the principals can more easily exercise their veto and are consequently less able to pool their authority. The pooling of authority carries the danger for the decisional actors (including the primary principals) to be outvoted (and hence be exposed to domestic damage), while delegation to independent supranational bodies allows to shift responsibility. Given the presence of the EP as a new veto player outside the Council, after the occurrence of the Schengen crisis the Commission presented a proposal that would significantly empower Frontex. According to the theorised causal mechanism, I expect the enhanced right of initiative of the European Commission within the decision-making process together with the introduction of the COD to be necessary factors for the transformation of Frontex into the new strengthened EBCG to eventually happen. Against this background, I maintain that the significant empowerment of Frontex was triggered by the occurrence of an unexpected external event (the Schengen crisis), whose impact highly depended on the initiatives and actions of further supranational intermediate principals in the decision-making process (e.g. Trauner and Ripoll Servent 2016).

In EU migration governance, EU legislators follow ever since the Lisbon Treaty the ordinary legislative procedure (entailing the mentioned QMV within the Council) when it comes to border control issues (Articles 77(2) and Article 78(2) TFEU).<sup>171</sup> Although for decisions on the future development of Frontex, majoritarian rules *within* the Council were followed, the Council is no longer the only decision-maker and needs to take decisions together with the EP. Once the Schengen crisis broke out, one of the major challenges that emerged was the suspension of the rules that were part of the AFSJ, resulting in the reinstatement of internal border controls within the EU (Biermann et al. 2017). The EU legislators as well as the EU Executive had to act quickly upon an emergency for which MS and EU institutions were caught unprepared. Unexpected and external events can thus create

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<sup>171</sup> Since the Lisbon Treaty, decisions within the Council are taken through QMV, although in some exceptional cases unanimity is still required – e.g. in the CFSP or in the area of EU finances, which are both closely intertwined with matters related to border control and asylum (Council of the European Union 2017b).

opportunities for actors to push for change that would be difficult to achieve under other circumstances (Trauner and Ripoll Servent 2016, 1421; see also Kaunert and Léonard 2012a).

The EU border control sub-policy is characterised by an incoherent development of visions and approaches, which are often competing with one another (Parkes 2015). Specifically, the empowered EP and Commission, which have become over time stronger intermediate principals in relation to Frontex, keep introducing their agendas into this complex policy, while being often unable to reconcile them with the Council's positions. Against this backdrop, the idea to reinforce border control co-operation by significantly empowering Frontex emerged in a schizophrenic setting, where MS started reintroducing internal border controls whilst the Council had begun since 2011 to foster – in response to the increasing migration flows in the wake of the Arab spring – supranationalisation through short-term solutions, as for instance the reform of the Schengen borders code. The amended Schengen borders code should have ensured the establishment of common rules for the temporary re-introduction of internal borders checks in *exceptional* cases (Regulation (EU) No 610/2013). The possibility for MS to re-introduce internal borders, a decision that would shake and threaten the core of the Schengen system, was thus paradoxically further acknowledged through the mentioned supranational regulation. In 2013, the Council had also adopted a regulation on the establishment of the Schengen evaluation mechanism,<sup>172</sup> in which it had already envisaged, based on the expertise and assistance provided by Frontex, announced and 'unannounced' on-site visits to evaluate the efficient application of the Schengen *acquis* in the MS. These unannounced on-site visits were then later included in the regulation establishing the EBCG.

The 2014 feasibility study, prepared for DG HOME, on a possible *system* of border guards had proposed a three-steps approach. First, the new system should have optimised the use of already existing instruments, e.g. by improving Frontex's supportive role. Second, it should have achieved the intermediary step towards a "full integration of external border management at the EU level" (Unisys 2014, 7), namely the delegation of responsibility to the EU level, through the 'hotspots'. The related operations at the hotspots would accordingly be mainly performed by the border agency in an effort of shared responsibility. Third, the temporary hotspot-mechanism should have eventually led to a permanent EU structure for the daily management of the common Schengen borders. For the realisation of this final third step, the comprehensive plan would however need a reform of the Treaties, since the current

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<sup>172</sup> Council Regulation (EU) No 1053/2013, establishing an evaluation and monitoring mechanism to verify the *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295 of 06.11.2013



text of Article 77 TFEU describes the policy on border control as an area of *shared* competence and not as one that is *fully* integrated. Before taking such an extensive step, stakeholders agreed in the end that the border agency should be first reformed, in order to be able to show its full potential and perform its tasks in a more comprehensive way. Once, the first and second step would have been accomplished, a shift in responsibility through the transformation of the external border control into a competence of the EU might be more likely (ibid.).

The exact decision-making process ultimately ending in the significant empowerment of Frontex in October 2016, can be traced back to 2014. In June 2014, primary principals stressed that the creation of an AFSJ was one of the key objectives of the Union and that “coherent policy measures” with regard to asylum, immigration and borders were necessary. Moreover, the possible long-term development of Frontex to enhance the control and surveillance capabilities at the EU external borders was being studied (European Council 2014, 1ff.).

At a meeting in October 2014, the JHA Council expressed its concerns regarding the increasing migratory pressure at the EU’s external borders and the related problem of secondary movements. In order to address these challenges, the Council stated that it would foster “the strengthening of Frontex’s ability to respond in a flexible and timely manner to emerging risks and pressures as well as to enhance the common asylum system” (Council of the European Union 2014b, 1). Nonetheless, at this point in time the idea of ‘strengthening’ Frontex was yet primarily related to the agency’s budget and operational capability.

Whereas at first the strategy of primary principals, specifically the heads of state and government, was to quickly fix the dramatic situation at the EU borders through budgetary increases and temporary reinforcement of the border control agency, EU leaders soon realised that the emergency could be solved only through more comprehensive, structural changes.

The pivotal document opening the way for a comprehensive reform to occur through the adoption of a completely new regulation significantly expanding Frontex’s mandate was the 2015 European Agenda on Migration. The European Commission’s Agenda of 2015 was accordingly defined as absolutely “ground breaking”. It was not only the kick off to Frontex’s transformation into a new EBCG, but also to the creation of the ‘hotspot areas’ (Interview with Frontex Expert 2 2018). The Commission alone took the initiative to issue such a document, the first of its kind.

Besides the intermediate principals, the role that primary principals have played during

and after the 2016 reform should not be belittled. MS have increasingly relied on the work of the agency, but are also sure about their control over this body through their representatives sitting in the MB. Nonetheless, there are two factors that need to be considered. First, the MB is deeply embedded in the structures of the border agency and even though it is composed of national border authorities' representatives, widening the agency's capacity to reach more effective and better results does not necessarily go against the interest of the MB. Second, representatives of the European Commission take also part to the meetings of the MB. The participation of the EU Executive to these meetings is not to be underestimated, since it allows the initiator of EU policy-making to influence decisions and to control the agency's day-to-day activity. The national representatives' positions in the MB and in the Council are consequently not always aligned (Interview with Frontex Expert 3 2018) and although the decisions that the border agency's MB usually takes are semi-political in nature, most of the time they are related to operational issues.

After the European Council had reiterated in April 2015 the purpose to strengthen Frontex's role especially with regard to return programmes and operations at sea (European Council 2015a), at its meeting in October 2015 it expressed its concrete intention to enhance the mandate of Frontex. Following the Commission's feasibility study, primary principals discussed the development of a European Border and Coast Guard System, in order to work towards the gradual establishment of an integrated management *system* for external borders (European Council 2015b, 3). The supranational agent and intermediate principal to Frontex had thus succeeded in getting its suggestion on the primary principals' agenda.

Against this backdrop, the European Commission presented its proposal for a new EBCG in December 2015. The proposal to establish an EBCG was also supported by the EP, which highlighted the link between reinforcing Frontex and the effective functioning of the Schengen area. The reintroduction of border controls at internal borders in several countries putting at risks the achievements of a Schengen area that had abolished such internal controls could be counteracted through the reform of Frontex into a stronger agency, capable of implementing an integrated border management. The EP further stressed that the proposal for a new ECBG would be "a key element to address the weaknesses" that had emerged in the context of the crisis (European Parliament 2016b, 127). As claimed by the European Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos, whereas Frontex "used to be limited to supporting Member States in managing their external borders, the new Border Agency will go beyond this. What we are creating today is *more Europe*" (European Commission 2015 [emphasis added]).

The migration crisis had also shown that many relevant decisions in the border control realm still depended on the primary principals' favour and that Frontex had been delegated enough power "to ensure the minimum requirement" for its operational autonomy, but that it still depended "entirely on the goodwill of the member states" (cf. Pollak and Slominski 2009, 920). The in-depth analysis on the use of EU funds for migration policies released by the EP in August 2016 shows, for example, that decisions regarding the deployment of additional funds during the Schengen crisis highly depended on national political interests. At the informal meeting of heads of state and government on 23 September 2015, MS agreed to deploy national funding in addition to the resources provided by the MFF<sup>173</sup> and repeated their commitment in October 2015 at the European Council. Nonetheless, in 2016 the EP lamented that many MS had not provided their matching contributions as promised (Kamarás, Saunier, and Todaro 2016, 14). The consequent dependence of Frontex on the primary principals' willpower should have been solved by the EBCG's strengthened mandate. In order to get to this reform, the Commission's proposal had to pass the scrutiny not only of supranational institutions, but also of national parliaments.

During negotiations on a new EBCG, the Netherlands were against a reinforcement of the Commission's powers through the enhancement of Frontex (Council of the European Union 2016a, 9).<sup>174</sup> According to the Dutch members, the MS should have remained in charge of taking major 'significant' decisions, instead of the border agency (together with the EU Executive) having a right to intervene on the national territory of a MS against its will. This very sensitive issue was criticised as an impairment of sovereignty.

Apprehension about the possibility to give the Commission too much power, by delegating the agency a right to intervene on national territory without consulting the MS in question, was shared also by Italy, Poland, Portugal and Romania (Council of the European Union 2016b; 2016c; 2016d; 2016e). These objecting MS agreed that an intervention by the EBCG in one of the EU MS should be based on an implementing decision of the Council and not on a decision of the Commission as stated in the initial proposal of 2015. The same argument was used by some countries (e.g. the Netherlands and Romania) with regard to the coerciveness on MS to contribute personnel to the agency according to a pre-set quota.

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<sup>173</sup> The current MFF establishes the "ceilings" for EU spending in different political fields for the period 2014-2020, ensuring the orderly development of EU expenditure within the limits of the Union. The EP requested a revision clause, in order to eventually review and modify the MFF in due course, in order to adapt it to the changing economic and political situation (Kamarás, Saunier, and Todaro 2016).

<sup>174</sup> Specifically, according to the members of the Reformed Political Party parliamentary group, "assigning new supranational powers as a reward for neglecting existing powers would not be appropriate and would offer little confidence in a better future." (Council of the European Union 2016a, 9).

Concerns were specifically raised with regard to the contributions MS would make in terms of numbers and expertise to the reserve pool of border guards. During the informal SCIFA meeting of February 2016, MS argued that they might not have been able to contribute to the pool in a situation where, given an extraordinary pressure of illegal migratory flows at their own borders, they might need their national border guards. On this occasion, national delegations further stressed that the border management systems and structures among the EU countries were so different, that calculating the number of contributions to the pool based on a percentage rule might prove difficult.

A further disputed point in the Commission's 2015 proposal was the introduction of national contact points, which some national parliaments (e.g. in Eastern EU countries such as Romania) regarded as a further interference of the European Commission in the internal affairs of the MS. However, Article 23 establishing that MS should appoint a national contact point for communication with the EBCG was eventually adopted in the final text of the 2016 regulation. MS were also worried about overlaps between the new agency's mandate and other institutional bodies, such as Europol (specifically with regard to the envisaged EBCG's new role in the fight against cross-border crime and terrorism) or the EURTF.<sup>175</sup> Nonetheless, cross-border crime prevention was in the end more prominent in the EBCG's final regulation than in the former ones.

Before the reform of 2016 was able to pass, several hurdles had thus to be overcome. In particular, the proposal for the introduction of a border guards' 'right to intervene' was not immediately approved as initially proposed by the European Commission, since primary principals within the Council felt, as mentioned above, that this and other new agency empowering changes were a huge imposition on their sovereignty. Greece, for instance, did not want to have more Frontex border guards at the border with Turkey or on the mainland border with Bulgaria.<sup>176</sup>

The European Commission, however, given its double role as a principal overseeing the development of Frontex but also as one of the EU's multiple agents, wanted the 2016 proposal for a new EBCG to be as "ambitious and forward looking" as possible (Interview with Frontex Expert 2 2018), in order to reinforce the EU executive. The natural tension between the urge of an agency to go as quick as possible in the face of an emergency and the duty of the Commission itself to "put a foot on the break", in order to keep MS appeased,

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<sup>175</sup> The role of the EURTF, the joint operational headquarters with representatives of all three agencies (i.e. Frontex, EASO and Europol) in the hosting MS, was to additionally support frontline EU MS.

<sup>176</sup> See also the Financial Times' article on the European Border Guard project available online under <https://www.ft.com/content/3fe699b6-3873-11e6-9a05-82a9b15a8ee7> (last accessed on 3.5.2018).

continued to be present also after the introduction of the new EBCG (Interview with Frontex Expert 2 2018).

The analysis of the negotiations within the Council and between the Council, the EP and the Commission revealed the ever-present paradox of the supranationalisation process of the border control sub-policy in particular and the migration policy in general. During discussions on the proposal for a new EBCG, although Frontex's primary principals seemed to acknowledge that the capacity of the new agency needed to be enforced as compared to the old Frontex, their readiness to give up powers in the realm of border control in favour of a reinforced supranational body was limited. Although negotiations and trilogues between the Council, the EP and the Commission on the proposal moved at a fast pace, the debate on the mentioned sensitive issues was quite intense.

During negotiations between the different interested parties, the duty of the future EBCG to report on a regular basis to the intermediate principals (EU legislators and Executive) about its activity received special attention. In this regard, Frontex's office in Brussels has, also after the agency's reform, a duty to regularly report to the DG HOME, in order to keep the EU Executive constantly up to date and to allow it to communicate in turn with the agency's headquarters in Warsaw on the EU's course of action. This provides the European Commission with first-hand information from the agency's expert centres and with additional (*ex post*) monitoring powers over Frontex's activity.

Before reaching a compromise on the numerous sensitive aspects of the proposed regulation, Frontex's first intermediate principal, the Council, met within the Frontiers Working Party in January and February 2016, to discuss the most important topics of the EBCG proposal: the shared responsibility in the area of border control; the EBCG's liaison officers in the MS; the procedure for establishing a vulnerability assessment; the functioning of the hotspots; "the handling of situations at external borders requiring urgent action by the Agency"; and, finally, the composition of the EBCG's teams, including the rapid reserve pool (Presidency of the Council 2016, 3).

Eventually, the European Commission was able to find enough leeway for its earlier project to establish an EBCG. Although the Commission constantly endeavours to advance proposals that represent a realistic compromise to be adopted by the MS' representatives in the Council and in the EP (e.g. Interview with Frontex Expert 2 2018, 2), the proposal for a new EBCG presented one major controversial aspect (COM(2015) 671 final), namely the future EBCG's *right to intervene*. According to the initial formulation of this right, the new agency would not have to wait for a specific request for assistance by the concerned MS. By

making use of this specific right, the reformed Frontex would be able to intervene promptly in an emerging crisis at the external border and thus ultimately protect the Schengen area (Agence Europe 2015j).

Following the COD, the EP was the first institutional actor to adopt its position at first reading on the Commission's proposal in July 2016 (Council of the European Union 2016f).<sup>177</sup> In its adopted report, the EP backed the proposal of the European Commission to establish a new EBCG, but amended (as did later the Council) the part regarding the agency's right to intervene<sup>178</sup> as well as the agency's impact on fundamental rights. The MEPs voted not only for increasing transparency and accountability of the border agency to the EP in particular, but additionally amended the original draft proposal so that any intervention of the agency would be still the result of a MS' decision within the Council through qualified majority and not of the Commission, as foreseen in the initial proposed text.

After the EP's first reading, the Council followed with its own reading according to the COD. In this reading, the Council especially supported the EP's amendment to remove the agency's right to intervene without an explicit MS' approval. When primary principals within the Council were negotiating and discussing the European Commission's proposed text for a new EBCG, there were approximately thousand sub-items that needed to be examined (Interview with Frontex Expert 4 2018).<sup>179</sup> During these negotiations, the supranational agent and simultaneously intermediate principal to Frontex, the European Commission, was an essential booster for primary and intermediate principals (the Council and the EP) to come to a conclusive compromise and thus to accelerate the whole process. The Commission sought to satisfy the primary principals' demands by proposing, for instance, trusted control mechanisms that ought to be in place, in order to prevent possible misconduct by the agency's members of staff.<sup>180</sup> The new task on the vulnerability assessment as such was in the end not discarded and the related specific article was eventually approved and officially adopted in the final text. In September 2016,<sup>181</sup> the Council finally gave its approval to the amended

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<sup>177</sup> The European Council had at its meeting on 16-18 February 2016 called on both the EP and the Council to reach an agreement on the proposal for a new EBCG by July 2016.

<sup>178</sup> For further details see the LIBE Committee Press Release available online under <http://www.europarl.europa.eu/news/en/press-room/20160530IPR29683/civil-liberties-committee-backs-new-european-border-and-coast-guard> (last accessed on 12.7.2019).

<sup>179</sup> The interviewed official emphasised further that in order to avoid misunderstandings between the different levels of authority, decisions among MS need to be taken point by point.

<sup>180</sup> Relatedly, Frontex Expert 4 (2018) explicitly referred to the former ED of EASO, José Carreira, who resigned in June 2018 after alleged misconduct in procurement procedures and irregularities in management of human resources.

<sup>181</sup> See also the Council's press release available online under <https://www.consilium.europa.eu/en/press/press-releases/2016/09/14/european-border-coast-guard/> (last accessed on 6.4.2019).

proposed text that would significantly empower Frontex and which was thus ready for adoption. The European Commission was eventually able to finalise a project that it had proposed a decade before and thus to co-determine a significant empowerment of the border agency, although it had to compromise with the other involved intermediate principals. The border agency's right to intervene was hence partially amended by the Council and the EP although for different reasons: the former did so because primary principals wanted to preserve their sovereignty, whereas the latter sought to guarantee Frontex's accountability.

The analysed official documents and interview data clearly show that decision-makers finally agreed on reforming and significantly empowering Frontex in 2016 nearly unanimously.<sup>182</sup> Although some countries as Greece and Italy were initially reluctant to bestow some of the envisaged additional powers on the border agency – which in the future would be consequently even more present on their national territory –, while being eager to receive more support in the face of the emergency, bigger donor countries (usually coinciding with the EU's 'strong regulators') tended to prevail and get their positions through. As shown in this section, however, primary principals were not the only actors that determined Frontex's significant empowerment.

After its 2016 reform, the agency can rely on an extensive delegation of power: Frontex can through its risk analyses, vulnerability assessments and increased number of experts exercise more influence on the EU policy-making and affect the proposals presented by the European Commission, which are in turn negotiated on, prior to their eventual adoption, by the Council and the EP. At the same time, the MB of the agency has control over the budget estimates and over the internal, structural decisions of the agency. In the MB, the national overweighs the EU power, since each MS has one voting right through a national representative with expertise in the field of border control and the European Commission has only two votes in total.

The key role that the Commission played in the evolution of Frontex revealed itself during the reform of 2016, but also during the events of September 2018, when the Commission tabled a new proposal for an additional strengthening of the existing EBCG. The

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<sup>182</sup> One of the interviewees stated that despite the fact that according to the agency's regulation all members of the MB have the right to one vote and are equal within this body, big donor countries inevitably had more leverage when it came to take decisions. Germany, for instance, plays a very active role within Frontex's MB, primarily because it provides the largest share of the agency's technical equipment (Interview with Frontex Expert 4 2018). According to Article 39 of the agency's new regulation, Frontex has to set up a technical equipment pool composed of equipment owned either by the MS or by the agency and equipment co-owned by the MS and by the agency for its operational activities.

Commission's additional proposal represents a further attempt to reinforce Frontex's right of intervention and to additionally expand the EU executive power (COM(2018) 631 final, in particular the new Article 43). According to this further envisaged reform, in case of a risk at the EU external border jeopardising the functioning of the Schengen area, it is the *Commission* and not the Council that would be able to decide if the agency should intervene in an emergency requiring urgent action. In this possible scenario, the agency would not have to ask the MS' permission (Article 41(3) of the 2018 proposal). The European Commission would establish the terms of co-operation between Frontex and the host MS as well as be responsible for the co-ordination of such activities. This second proposal foresees further that the potentially enhanced EBCG should be able to assist MS in *preparing return decisions* for national authorities, which will nonetheless continue to preserve their sovereignty for the actual return decisions. Relatedly, the Commission also proposed that Frontex should additionally be able to launch operations with third countries and deploy its agents in their territory based on a common agreement (see also Agence Europe 2018d). The link between securitisation of the external borders, return and co-operation with third countries has seemingly strengthened over the years.

The European Commission signalled through this proposal that it took again action to push supranational positions forward in its double role as intermediate principal and supranational agent. The proposal of 2018 does not only envisage a strengthened EBCG with a border guards standing corps of 10,000, but also an enhanced role of the EU Executive itself, which would be in charge of making urgent decisions in case of an emergency.

### **4.3 Interim Conclusion**

The significant expansion of the agency's mandate took place after the emergency of 2015-16 and Frontex thus experienced a huge reform as an immediate result of the Schengen crisis. The exponential numbers of people fleeing to Europe elicited the crisis that challenged the already weak border control systems of the EU MS. It was only with the launch of the new EBCG that Frontex was provided with more responsibilities and, most importantly, with monitoring tasks over the MS to assess their vulnerability in the field of border management. This is an absolute novelty compared to the previous mandate of Frontex. The transformation of the old Frontex into a new EBCG was eventually endorsed by MS, not exclusively because of the occurrence of an "unexpected external event" (Trauner and Ripoll Servent 2016, 1420), but also because, as the outlined evidence showed, national authorities had continuously relied over the years on the agency in matters related to border control.



Although the migration crisis showed the weaknesses of a cracked supranational system, Frontex developed regardless of the intergovernmental backlash experienced by the EU. The immediate intuitive expectation after the crisis would have been rather the opposite: given the dysfunctionalities of Schengen, some MS resorted, pressured by populist and right-wing parties at the domestic level, to national solutions. Frontex seems thus to represent an exception, since its mandate was expanded in 2016 to enhance supranational co-operation.

Although EU institutions and politicians tried to convey the idea that ‘border’ and ‘Europe’ have become mutually exclusive, since the EU’s aim was (and is) to grow into an ‘ever-closer Union’ bringing together peoples and different cultures by dissolving (internal) borders (Vayssière 2015), borders continue to persist in the collective. The continuous tension on where the responsibility for border control ultimately lies (whether at the national or the supranational level) translated in the successive changes ranging from the initial establishment of an intergovernmental Common Unit to the enforced EBCG.

Due to policy developments that coincide with the theorised scope conditions as well as to the activities of the intermediate principals, Frontex has experienced an unprecedented expansion of its mandate after the Schengen crisis. The crisis raised internal security concerns among MS (e.g. Lavenex 2018) and triggered at first short-term solutions, such as strengthened JOs co-ordinated by Frontex. Eventually, primary principals realised that unilateral solutions (such as the reintroduction of internal border controls) could not solve existing problems and that rather long-term solutions as the strengthening of co-operation at the external borders should be encouraged.

In 2016, the negotiated compromise between primary and intermediate principals led to the approval of an upgraded Frontex, the EBCG. Former amendments to the establishing regulation of Frontex in 2007 and 2011 as well as its more than a decade long activity in the area of border control paved the way for Frontex’s 2016 reform. Such reform was the result of the European Commission’s prolonged efforts to finally transform a merely co-ordinating structure into a strengthened border and coast guard agency. The new EBCG has thus acquired more influence and powers, but it remains according to MS’ officials an “ideas provider” rather than a decision-making authority strictly speaking (Interview with Frontex Expert 4 2018).

The analysis carried out in this chapter on Frontex revealed the in-between decision-making steps leading from the crisis to the creation of the EBCG. In the first part of the

hypothesised causal mechanism, right after the outbreak of the crisis diverging positions should have been observable among MS. The first theoretical proposition (presented in subsection 3.2.1) – assuming that when the positions among the primary principals diverge, they result in deadlock situations from which the multiple agents profit to foster a significant agency empowerment – does not entirely match the very complex reality on the ground. Although MS initially resorted to unilateral actions such as the reintroduction of internal border controls and temporary solutions, instead of endorsing a comprehensive reform of Frontex right from the beginning, the crisis did not trigger a clear ‘deadlock’ situation within the border control sub-policy as hypothesised in the first theoretical proposition.

Moreover, instead of pushing *against* the primary principals’ will, the European Commission was able to pass a reform for the reinforcement of the border agency by just acting as a catalyst of the primary principals’ positions. The reform of Frontex into the new EBCG was one of many steps taken by the European Commission to achieve a shift in the political paradigm and thus reach a common European line. The supranational agent played a significant role in keeping the balance between the political interests of primary principals on the one side and the interest of the agency to perform at its best on the other. The political inertia to which MS were relegated during the Schengen crisis and their acknowledgement of the importance of Frontex’s activity, created the opening for the multiple agents, that is the Commission following Frontex’s requests, to push for a consequent significant agency empowerment. The multiple agents thus would have not achieved this outcome, if the specific emergency situation had not been present. At the same time, although the EP, as the second intermediate principal, was initially against a reinforcement of Frontex (especially in the field of return of TCNs), during the Schengen crisis it did not oppose the proposal of the Commission for an enhanced border agency.

The second proposition, which assumes that unanimous decision rules among the intermediate principals usually lead to decisions that allow for more power delegation to the agent, has also to be refined in the light of the collected evidence. Both the Council and the EP need to agree upon new legislation and the EP has hence, at present, the power to block proposed legislation, if it cannot agree with the Council. This makes the decision making process ‘demanding’, since both intermediate principals need to reach consensus on the proposed regulation’s text. Against the specific COD, the Council does not take decisions alone, but knows that it is to respect the ordinary legislative procedure involving the EP. Once the EP backed the 2015 proposal of the Commission, it affected the whole decision-making process on the new EBCG allowing to push the proposal further despite initial reluctance (e.g.

in the case of the vulnerability assessment).

With the 2016 reform, the agency has gained more powers, in particular through the so-called vulnerability assessment (although in its ‘softened’ version) as well as through its stronger role in co-ordinating return operations. This trend seems to be additionally confirmed by the newest 2018 proposal of the European Commission, advancing the idea of a further extension of the EBCG’s mandate (COM(2018) 631 final).

The third proposition expected the relevance of shared competences and the primary principals consequent increasing reliance on the agency’s activity to face challenges at the EU borders, to be necessary for a significant empowerment of Frontex to occur. The MS’ stronger co-operation over the years with Frontex and the provision of increasing resources to the agency, are all indicators of the stronger dependence that primary principals have on the EBCG, which was a necessary pre-condition for Frontex’s significant empowerment.

In conclusion, the analysis revealed three trends. First, primary principals in the EU are still not prone to delegate ‘core state powers’ (Genschel and Jachtenfuchs 2018) when the probability of sovereignty losses is high. The different positions within the Council and the related discussions about a further significant empowerment of the EBCG suggest that the Southern countries of the EU were more preoccupied about such a change than EU countries in the North, i.e. the so-called strong regulators. Southern countries such as Greece, Italy and Spain worried that an additional expansion of Frontex’s mandate might restrict their national border authorities’ powers as well as the overall control over national borders. At the same time, these countries called for reinforced EU co-operation in the border control area, since they are more likely to be exposed to migratory pressures and thus need to rely on Frontex’s support and specialization.

Second, during the Schengen crisis intermediate principals’ positions (some of them mirroring those of the primary principals) converged on the proposed Frontex’s reform, but due to different reasons than a classic P-A approach might have expected. EU MS did not have strongly diverging positions during the establishment phase of Frontex in 2003-04 nor during the amending discussions of 2010-11. When the Schengen crisis broke out in 2014-15, the authorities of some MS, especially those whose national borders coincide with the common external borders of the EU, were overwhelmed by the high number of migrants who were trying to enter the EU. Against this background, reaching common EU solutions turned out to be more challenging. Eventually, those MS whose systems were tried by the unexpected migratory pressures agreed to a reinforcement of the border agency although they

were afraid of losing sovereignty, because of the lack of alternatives. Strengthened co-operation with Frontex was the only support they would receive from the EU. The rest of the EU MS, usually coinciding with Northern European countries with strong regulatory systems, welcomed a reinforcement of the border agency, because on the one side, their sovereignty was not directly under threat and on the other, they could thus shift responsibility for the protection of the external borders to an external body. These positions were reflected in the Council's numerous discussions. Whereas the Council's positions were mainly directed to the protection of the primary principals' positions, the European Commission aimed at deepening integration in the area of border checks and at reinforcing the overall EU's executive branch.

Third, the analysis revealed that the European Commission is not simply a supranational agent of the EU legislators and EU MS, but also an intermediate principal with regard to Frontex. Especially after the Treaty of Lisbon, the EU supranational agent has been acknowledged a wider range of initiative and seems at present to pull many important strings – in particular, when it comes to the establishment and further development of EU agencies. Since 2002, the EU Executive had tried to create a strong body patrolling the common border of the EU. It ultimately succeeded in its purpose only once receiving the support of the EP and once MS realised how their national security was closely tied to Frontex's ability in enhancing co-operation and providing information. During the reform process, the EP sought to gain more control over the border agency and thus guarantee the agency's accountability. The Parliament stood for 'more Union', echoing the Commission's maxim, but it also partially followed its own agenda.

The analysis on Frontex's development confirms that the EU Executive is in charge of initiating any reform process to empower the EU agency further, but it also plays a key role in Frontex's day-to-day activity. In 2017, following the revision of DG HOME's organigram,<sup>183</sup> the Commission "revised its decision on the Commission representatives in the Management Boards, providing in most cases for higher representation through the involvement of the Deputy Directors-General." (DG Migration and Home Affairs 2018, 85). Additionally, in a 2017 interim evaluation, the European Commission emphasised the relevance of border security in order to guarantee a related 'secure' society (European Commission 2017e, 83ff.). Frontex was here explicitly mentioned as a key player with an important co-ordination role in "liaising" with the different national counterparts (ibid., 108). This document in particular

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<sup>183</sup> While the Director General (at present Ms. Paraskevi Michou) is primarily in charge of overseeing Directorate A on Strategy and General Affairs as well as the units B1 and B2, the two Deputy Directors-General oversee directorates C and E as well as directorate D and the remaining two B units. For further details see Directorate General Migration and Home Affairs (2018).

showed that the border agency was officially considered by 2017 to have a deep level of experience that had shaped its essential role not only as a repository of information, but also as an essential co-ordinator between national authorities.<sup>184</sup>

Against this backdrop, the process-traced analysis on Frontex presents also some caveats. First, although the influence that Frontex's activity (primarily in the form of risk analyses) had and has on the positions of the primary principals mattered for its significant empowerment to occur, the evidence does not show whether Frontex purposively pushed for an expansion of its mandate other than by asking for an enhancement of its resources during the migration crisis.

Second, the intrinsic aspect of the agency's 'status', i.e. how it is perceived by its principals, due to the expertise it developed and the support it has offered over the years seems to have co-determined the European Commission's proposal for a reform of the agency. The conclusion that one could draw from this observation is that part of what composes the agency's significant empowerment notion cannot be strictly separated from the entities and events that theoretically determined such an empowerment. The very essence of the outcome this thesis seeks to explain seems to influence in turn the decisions made by the intermediate principals, thus allegedly and partially reversing the direction of the theorised causal mechanism.

Further illegal border crossings after 2016 especially at the EU Southern maritime borders seem to have further expedited the enforcement trend in the realm of border control leading to a follow-up proposal for the additional expansion of the EBCG's mandate. In June 2018, the European Commission announced that it would propose to almost triple the funding for migration and border management up to €34.9 billion. Along with this financial increase, the Commission also proposed to equip the new EBCG with a novel standing corps of approximately 10,000 border guards.<sup>185</sup>

The MS' reactions were not consistent with regard to the proposal for a further strengthened

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<sup>184</sup> In this regard, it should be noted that in 2017 only two agencies adopted budget amendments, namely the European Agency for the operational management of large-scale IT systems (eu-LISA) and Frontex. Frontex's budget amendment corresponded to a total of €20 million both in commitment and payment appropriations, a sum without precedent (DG Migration and Home Affairs 2018, 86).

<sup>185</sup> Interview data revealed that hiring 10,000 border guards might be quite challenging. The Human Resources Department of Frontex has always encountered difficulties when recruiting, because of the agency's seat in Warsaw. The coefficient rate as established in the EU Staff Regulations (Regulation No 31 (EEC), 11 (EAEC) of 2014) determines a lower salary in Poland, where the headquarters of Frontex are placed, and consequently represents a sizeable hurdle to recruitment (Interview with Frontex Expert 3 2018).

EBCG (COM(2018) 631 final).<sup>186</sup> The proposal of the European Commission presented in 2018 to expand the EBCG further by 2020 seems rather unfeasible given the current status of the system (see also European Commission 2018e). To achieve and implement such major structural changes, “certain member states” would need to step up and convince other important EU players that more integration is needed (Interview with Frontex Expert 3 2018).

Although it is not within the remit of this study to analyse the Commission’s 2018 additional second proposal, it is nonetheless remarkable how fast the European Commission came up with another reinforcement plan for the newly established EBCG. The mentioned proposal suggests that the European Commission sought to further expand the EU’s executive power in the realm of border control and to eventually transform Frontex into a “Community border police force” (Agence Europe 2018d).<sup>187</sup>

Frontex’s case has displayed the strong ties between the different institutional players in EU migration governance as well as the significant empowerment of this EU body (and apparently its continuous development, given the Commission’s proposal of September 2018) in the border control sub-policy. Primary principals are not opposing this development, although some EU MS disclosed their initial reluctance in this regard. EU MS are thus voluntarily delegating more powers to the EU multiple agents through the intermediate principals’ decision-making authority (i.e. the Council and the EP) and consequently endorsing further supranationalisation in the broader AFSJ.

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<sup>186</sup> Upon such a proposal, the Austrian Chancellor Sebastian Kurz informed the press about the reticence manifested (again) by Southern EU countries (i.e. Greece, Italy and Spain) to approve such a reinforcement, because of their fear of possible losses of sovereignty. However, the Austrian Chancellor, hosting an informal summit in Salzburg during which the Commission presented its 2018 proposal, hoped that an agreement could be reached by the end of the year within the Council (Agence Europe 2018e).

<sup>187</sup> The main changes suggested by the proposal regard the operational effectiveness of the agency’s standing corps. In particular, the EBCG should be authorised – although still under the control of the hosting MS where the operations are carried out – to dispose of comprehensive implementation powers, as for instance identity checks and authorising or refusing entry at the external borders, in order to fight illegal immigration.

## Chapter 5: Empowering the European Asylum Support Office

The overarching question guiding this study is whether the Schengen crisis triggered a *significant* empowerment of migration agencies and specifically, for the second case on EASO, how such an empowerment takes place in the asylum sub-policy.

Mirroring the structure of the previous chapter on Frontex, Chapter 5 offers a systematic within-case analysis on the Support Office to better exemplify the comparison between the two migration agencies. The next sections explore whether an empowerment of the European Asylum Support Office has taken place since 2010 (the year of its establishment) and whether – and *how* – the Schengen crisis triggered or not a significant agency empowerment in the asylum policy. The relations between the Support Office and other relevant institutional actors at the EU level are investigated in detail, in order to shed light on the mandate of the agency and its evolution. In order to understand the reform steps that have been undertaken after the Schengen crisis to transform EASO into a fully-fledged agency replacing the existing structure, this dissertation concentrates on the most relevant years of the migration crisis and the period right after.

The tasks delegated to an agent can tell the researcher together with data on the agent's resources and issue scope, how much power has been delegated to the agent in question and thus show how it has developed over time as well as how much it has been 'empowered'. In the specific case of EU migration agencies, tracing such a development is the preliminary step before examining the different stages that can lead, given a specific trigger and scope conditions, to a significant agency empowerment. Hence, outlining the history of EASO since its establishment by following the empowerment definition and its main aspects paves the way, as done for the analysis on Frontex, to understanding the mechanism and P-A relations behind the possible reform of EASO into a strengthened EUAA.

After describing the mandate of the Support Office in terms of tasks, capabilities and issue scope as well as the agency's role in its institutional setting, the second part of the chapter traces the theorised causal mechanism (see sub-section 3.2.1). According to the three developed propositions, if primary principals' positions diverge determining a deadlock situation in the decision-making process, the multiple agents are expected to push for a significant agency empowerment, which is ultimately agreed on by the primary and intermediate principals. Necessary scope conditions for the causal mechanism to play out are the shared competences in the sub-policy in question, which determine that the agency becomes over the years indispensable for primary principals to achieve supranational operational co-operation. Given a crisis, the primary principals are particularly dependent on

the agency's assistance and the information it provides.

In order to trace the causal mechanism, first the positions of the primary and intermediate principals are outlined, to then analyse how multiple principals and multiple agents come into play for the outcome of interest to occur, that is the significant empowerment of EASO.

The first essential step towards a significant empowerment of EASO, was undertaken by the European Commission in May 2016 by presenting its proposal to transform the Support Office into a new EUAA (COM(2016) 271 final). The content of the 2016 proposal is closely intertwined with the legislative framework the Support Office is embedded in, namely the Common European Asylum System, in short CEAS, which is a constant 'work in progress' and fraught with numerous implementation challenges given the sensitivity of asylum related matters.

By following the P-A theoretical approach, I argue that the primary and intermediate principals at the EU level are influenced by the actions and information provided by the multiple agents, which altogether play a pivotal role in the decision-making process regarding the strengthening of EASO. As done in the previous chapter for the case of Frontex, it is the purpose of this chapter to show how the entities of the theorised causal mechanism interact in the asylum policy field and how this might or might not lead to a significant agency empowerment.

With the purpose of understanding changes in the EU asylum policy, the analysis goes back to EASO's establishment in 2010. The premises for the creation of a Support Office in the realm of asylum were different from those that determined the establishment of Frontex. Whereas the latter resulted from a gradual process and from the primary principals' conviction that the establishment of an agency was an unavoidable step to enhance border control at the external perimeters of the EU, government representatives were less persuaded by the idea of an asylum agency. Nevertheless, the regulation establishing the Support Office was the first legal instrument that the European Commission had proposed and that was eventually adopted among the planned reforms related to asylum issues. Among the difficulties encountered during negotiations on the Office's establishing mandate, were the specific primary principals' concerns about the risk of overlaps and conflicting points between the tasks of EASO and Frontex (Comte 2010, 392).

The history of EASO is inevitably intertwined with the reform of the Dublin system and the related CEAS as a whole. The EU's and MS' actions remain embedded in an



‘anachronistic’ (and hence no longer able to regulate increasing flows of asylum seekers) Dublin system, which is currently enshrined in the Dublin III Regulation No. 604/2013. The Dublin system remains a cornerstone in building the CEAS and an indispensable tool to share responsibility among EU MS for the examination of asylum applications (European Council 2009a, 32). Notwithstanding this point, the current CEAS and Dublin system are not the only factors impacting the office’s development as the following analysis shows.

The Support Office has always existed in the shadow of the Dublin system. Given the deficiencies of the EU asylum system, in 2016 the European Commission concomitantly presented its proposal for a Dublin IV regulation (European Commission 2016d). The proposed Dublin IV regulation, which would replace the current Dublin III (more details on the whole Dublin system and its legal basis follow in sub-section 5.2.1.1), constitutes the core of the European Commission’s package of legislative proposals for the reform of the CEAS. This package of legislative proposals includes also the proposed reform of the Support Office into a EUAA.

The following sections first analyse the mandate of the Support Office and its core elements, i.e. tasks, issue scope, and capabilities (section 5.1), in order to then move to the possible causal mechanism behind the envisaged reform of the office into a fully-fledged agency by examining the scope conditions, the trigger, the primary and intermediate principals’ as well as the multiple agents’ positions and their involvement in the decision-making process (section 5.2).

In addition to the hurdles encountered to conduct interviews with the agency’s staff,<sup>188</sup> academic work on this specific agency is also meagre if compared to studies on Frontex. The following analysis thus builds on the earlier reviewed academic literature on EASO and the CEAS in general as well as on primary sources (e.g. the agency’s regulation, official documents and reports issued by EU institutions), in order to trace the history and unfolding of EASO’s mandate.

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<sup>188</sup> As outlined in the introduction, methodologically I planned to underpin the analysis of official documents and academic literature with semi-structured interviews. Whereas in the case of Frontex some experts – although not as many as planned – agreed to my interview requests, in the case of EASO, despite contacting the agency’s press and research offices several times, I have never received any reply. Only once, I was able to get hold of one of the Support Office’s staff members working for the agency’s research department, but without being able to follow-up with an interview. A former official of the Support Office, who shared sensitive information about the agency’s work as well as challenges encountered during the time spent there, was also not willing to share names and contacts of former colleagues working at EASO. The interviewee asked for anonymity and highlighted *inter alia* that the agency had been in troubled waters ever since the resignation of the former ED José Carreira, which might be one possible reason for the agency’s lack of response (Interview with EASO Expert 1 2018).

## **5.1 The Support Office's Mandate**

This section analyses after a brief introduction to the Support Office's mandate the three empowerment components, in order to trace changes in the Support Office's history, while the upcoming section (section 5.2) spotlights the different positions and roles of both primary and intermediate principals as well as of the multiple agents themselves in the decision-making process.

The Hague programme of 2004 had first introduced the idea of an asylum office supporting primary principals in the effective implementation of a common asylum policy. The next essential step towards co-operation in asylum related matters was taken in 2009, which signed a very important year for the EU as a whole since it was the year of the entry into force of the Lisbon Treaty. The Stockholm programme of 2009 (an essential document also in the case of developing Frontex's mandate, as previously outlined in sub-section 4.2.2.2) was the first official document highlighting the tasks that the Support Office would have to perform starting from 2010. The document stated that EASO would be an important tool not only "in the development and implementation of the CEAS" but also in "strengthening all forms of practical cooperation between the Member States", e.g. by developing a common educational platform for national asylum officials (European Council 2009a, 32).

The mandate of the Support Office builds, according to its establishing regulation, on three pillars: (1) the enhancement of practical co-operation on asylum among MS, (2) the support to MS whose asylum systems are under particular pressure and (3) the contribution to the implementation of the CEAS (Article 1 of EASO's 2010 regulation; the specific tasks related to these three pillars are analysed in detail in the upcoming sub-section 5.1.1).

The Support Office is according to its establishing regulation a regulatory agency, but not a fully-fledged one and although it follows the legal structure of other JHA agencies (an independent legal person with a legal basis in EU secondary law), it presents some peculiarities as, for instance, the appointment of its ED. The first stage of the procedure to appoint the Support Office's ED is similar to the one that is followed by any agency, e.g. by Frontex: the MB appoints the future ED among the suitable candidates chosen by the European Commission, the latter thus exercising influence on the agency's most important representative. In the case of EASO, however, this standard procedure was partially modified: if the MB should not be satisfied with the suitability of any candidate, it can require a new procedure. Moreover, before appointment the candidate selected by the MB for the ED's position has to make a statement before the competent committee (or committees) within the

EP and answer the questions of the MEPs (Article 30(1) of EASO's establishing regulation). The procedure thus also includes a "strong intervention by the Parliament at the end of the process" (Comte 2010, 388).

These peculiarities signal the increasing power of the Parliament over asylum matters and the strong intergovernmental character of the Support Office's mandate given the influence of national authorities within the MB. The word 'support', which stands out in the name given to the office, remarks its auxiliary character and its key mission, namely offering help to MS and being fundamentally limited to such a prime task only. In the light of these considerations, it is important to briefly describe the composition of the Support Office's MB before moving further to the tasks carried out by EASO (as outlined in the upcoming sub-section 5.1.1). EASO's MB is composed of the representatives of all (at present still 28, despite the ongoing Brexit negotiations) EU MS including Denmark<sup>189</sup> and two representatives of the European Commission, specifically the Director General of DG HOME and its deputy. Besides these members, four potential observers from Iceland, Liechtenstein, Norway and Switzerland as well as a representative of the UNHCR Bureau for Europe<sup>190</sup> participate in the MB's meetings. As in every regulatory agency, the configuration of EASO's MB presents a *de facto* minority of the European Commission, which has only two voting rights. In the past, this led some observers to draw the conclusion that within the MB's decision-making, agencies as EASO become just another forum to give "power back, to some extent, to the Member States" (Comte 2010, 387).

Against these specificities, in the following I analyse the tasks as well as the resources (both financial and personnel) and issue scope of EASO, in order to trace the development of the agency over time.

### **5.1.1 The Support Office's Tasks**

The tasks of the Support Office are outlined and summarised in Chapter 2 of its 2010 regulation, which builds up on the three pillars (or rather 'sections' as in the regulation's wording) mentioned in the previous section. Each of the three pillars is then sub-divided into a certain number of tasks.

The first main task and *duty* of the office is, as reflected in its current name, to 'support' practical co-operation on asylum. The regulation accordingly states that the Support Office

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<sup>189</sup> Although Denmark has an observer status.

<sup>190</sup> "Given its expertise in the field of asylum, the UNHCR should be represented by a non-voting member" of the MB, in order to be "fully involved" in the work of the Support Office (recital 17 of EASO's regulation).

has to “organise, promote and coordinate activities enabling the exchange of information and the identification and pooling of best practices in asylum matters between the Member States” (Article 3). The second duty and task of the agency is then to gather relevant, accurate and reliable information on countries of origin of people applying for international protection; to draft a follow-up report based on this information; and manage and further develop a portal where this information is gathered (Article 4). Third, in cases where MS have to face disproportionate pressure on their asylum system, EASO needs to support and co-ordinate consequent activities related to relocation within the EU (Article 5).

Besides these main tasks, the Support Office has to offer high-level training to all members of national administrations, courts, tribunals and all national services dealing with asylum issues in the different MS (Article 6). It has also to support MS, whose asylum systems are under particular pressure (Article 8, 9 and 10 under section 2) and it can do so only if the MS concerned explicitly requests the office’s help. The last section on the agency’s tasks (section 3) is then finally dedicated to the Support Office’s contribution to the CEAS’ implementation, a contribution that essentially translates into information gathering and the drawing up of annual reports, which are based on such information and present the situation of asylum in the EU. Although the decision on the future EUAA is still pending, *Table 5.1* summarises not only the contemporary tasks of the Support Office, but also those that are envisaged for the planned EUAA. In order to visualise better how the reform would actually transform EASO, *Table 5.1* compares EASO’s tasks as set out in its establishing regulation of 2010 and the tasks foreseen by the Commission in its 2016 proposal for a new EUAA.

The main and most controversial changes that the regulation replacing EASO with a fully-fledged EUAA would introduce, correspond to the gathering and analysing of information on the implementation of the CEAS as well as to the monitoring of MS with regard to such implementation. According to this latter task, in the future MS would have to submit to the agency, on a monthly basis, relevant information on decisions taken in relation to asylum applications.

Table 5.1 *EASO's versus EUAA's Tasks*

Council Regulation (EU) No 439/2010	Proposal for a Regulation on the EUAA and repealing Regulation (EU) No 439/2010 [COM(2016) 271 final]
1. The Support Office shall facilitate, co-ordinate and strengthen practical cooperation among Member States on the many aspects of asylum and help to improve the implementation of the CEAS. (Art. 2(1)).	1. The Agency shall facilitate, co-ordinate and strengthen practical cooperation and information exchange among Member States on various aspects of asylum; <b><i>gather and analyse information on the situation of asylum and on the implementation of the CEAS; support Member States in implementing the CEAS</i></b> (Art. 2(b) and (c)).
2. The Support Office shall provide effective operational support to Member States subject to particular pressure on their asylum and reception systems, drawing upon all useful resources at its disposal (Art. 2).	2. Provide effective operational and technical assistance to Member States, in particular when they are subject to disproportionate pressure on their asylum and reception systems. [...] <b><i>The Agency and the Member States' asylum authorities, national immigration and asylum services and other national services shall be subject to a duty to co-operate in good faith and an obligation to exchange information</i></b> (Chapter 2 Art. 3(1)).
3. Assist Member States on training of experts from all national administrations, courts and tribunals, and national services responsible for asylum matters, including the development of a common core curriculum.	3. The Agency <b><i>shall establish and develop training for members of its own staff</i></b> , members of all national administrations, courts and tribunals, and national services responsible for asylum matters in the Member States; [...] <b><i>The Agency shall take the necessary initiatives to ensure that the experts who participate in the Asylum Support Teams (ASTs) and the asylum intervention pool (AIP), have received specialist training (...) The Agency shall conduct regular exercises with those experts in accordance with the specialist training and exercise schedule referred to in its annual work programme</i></b> (Art. 7(1) and (7)).
4. The Support Office shall organise, promote and co-ordinate activities enabling the exchange of information and the identification and pooling of best practices in asylum matters between the Member States (Art. 3) [The MS can provide this information on a voluntary basis and EASO just “pools” best practices].	4. <b><i>The Agency shall, on its own initiative or at the request of the Commission, (...) develop operational standards</i></b> on the implementation of the instruments of Union law on asylum and <b><i>indicators for monitoring compliance with those standards as well as guidelines and best practices</i></b> related to the implementation of the instruments of Union law on asylum. (Art. 12(2)).
5. The Support Office shall organise, promote and co-ordinate activities relating to information on countries of origin (Art. 4).	5. <b><i>Co-ordinate efforts among Member States to engage in and develop a common analysis of the situation in third countries of origin;</i></b> (Chapter 3 of the proposal, specifically Article 10(1)); <b><i>MS shall, on a monthly basis, submit to the Agency relevant information on the decisions taken in relation to applicants for international protection</i></b> originating from third countries subject to the common analysis (Art. 10(4) of the proposal); the Agency shall assist the Commission in regularly reviewing the situation in third countries which are included in the common EU list of safe countries of origin (Art. 11(1)).

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6. It shall assist with the relocation or transfer of beneficiaries of international protection within the Union (Art. 5)

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7. The Support Office may co-ordinate the necessary technical and operational assistance to the requesting MS (or more than one MS) and the deployment, for a limited time, of an asylum support team in the territory of that MS on the basis of an operating plan as referred to in Article 18. (Art. 13(2))

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8. On a proposal by the ED, the MB shall decide by a majority of three quarters of its members with voting rights on the profiles and the overall number of the experts to be made available for the ASTs (AIP). Member States shall contribute to the AIP via a national expert pool on the basis of defined profiles and propose experts corresponding to the required profiles (Art. 15(1) and (2)).

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6. (*No changes*)

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7. (...) The Agency shall **contribute to the ASTs with experts from its own staff employed specifically for field work and interpreters** (Art. 17(8)). [Moreover] the Agency may deploy its own equipment to MS to the extent that this may be needed by the ASTs or the experts from the AIP and insofar as this may complement equipment already made available by the MS or other Union agencies. The **Agency may acquire or lease technical equipment** (...) (Art. 23(1) and (2)).

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8. For the purposes of Article 22 (of the proposal, which regards the “Disproportionate pressure on the asylum and reception system”), the MB shall, on a proposal of the ED, set up an **AIP which shall constitute a reserve of experts placed at the immediate disposal of the Agency. For that purpose, Member States shall, on a yearly basis, make available to the Agency a number of experts of not less than 500 persons.** (Art. 18(1))

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9. **Monitor MS in the implementation of the CEAS (new Chapter 5)** - The Agency, in close cooperation with the Commission, shall establish a mechanism to: (a) monitor the implementation and assess all aspects of the CEAS in MS (...); (b) monitor compliance by MS with operational standards, indicators guidelines and best practices on asylum; (c) verify the asylum and reception systems, capabilities, infrastructure, equipment, staff available, including for translation and interpretation in MS, financial resources and the capacity of MS’ asylum authorities, including the judicial system, to handle and manage asylum cases efficiently and correctly. (Art. 13(1) of the proposal); [...] The Agency shall set up teams of experts for each monitoring exercise, including for the on-site visits as necessary. The teams of experts shall be composed of experts from the Agency’s own staff and Commission representatives (Art. 14(2)).

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*Own elaboration.* Source: (Regulation (EU) No 439/2010; European Commission 2016f)

Whereas EASO currently needs to rely on the *voluntary* provision of information by MS, according to the new proposal EU MS would have a *duty* to co-operate and an *obligation* to exchange information. For this purpose, the reformed agency would assist the Commission in regularly reviewing the situation in third countries of origin. At the same time, the EUAA would establish a mechanism in close co-operation with the Commission to monitor the concrete implementation of the CEAS in all MS and their compliance with operational standards and best practices on asylum. Specifically, the agency's ED would submit, after the monitoring phase, recommendations to the MS concerned, outlining the necessary measures to address possible identified shortcomings (draft Articles 13 and 14 of the 2016 proposal (COM(2016) 271 final)). The new agency would also dispose of teams of experts to carry out on-site visits and verify the asylum and reception systems of EU countries, including their judicial systems to manage asylum cases in a correct and efficient way. Hence, the EUAA could be carrying out regular inspections and put liaison officers in place.

Specifically, according to the 2016 proposal to the end of appropriately monitoring MS in their application of the law, the agency would additionally assess all aspects of the common asylum policy, as for instance reception conditions and the respect for procedural safeguards. For this specific purpose, the future EUAA would be entitled to make “unannounced on-site visits” to EU countries (European Parliament 2016d, 47) and would also be able to deploy an AIP of at least 500 experts contributed by MS (a point that was strongly supported by the EP), in cases where the asylum and reception systems of an EU country were to be subject to disproportionate pressure.

Besides these major novelties, the proposed 2016 regulation specifies and widens some of EASO's most relevant tasks, such as the training of experts participating in the Asylum Support Teams (ASTs) or the development of operational standards on the implementation of asylum law to better monitor compliance with such standards. The new EUAA would be accordingly able to contribute to the ASTs with experts from its own staff employed specifically for field work and acquire or lease its own technical equipment. Moreover, if a MS would request it, the EUAA could even accept and assess applications for international protection submitted in the hotspots (envisaged Article 21(b)(2) and see also Article 32 of the Commission's 2016 proposal (COM(2016) 271 final)).

How this tasks' expansion might impact the overall issue scope of the agency is analysed in detail in the corresponding section 5.1.3. As written in EASO's annual report of 2016, the events of 2016 led to an “unprecedented growth of EASO's operational budget and the (*de*

*facto*) scale of its activity” (European Asylum Support Office 2017, 60).

After presenting in the next two sub-sections the development of EASO’s personnel and financial capabilities as well as the agency’s issue scope, section 5.2 turns to the overarching research question and analyses decisions affecting EASO’s mandate and role in the aftermath of the Schengen crisis.

### **5.1.2 The Support Office’s Capabilities**

The text establishing the Support Office explicitly states that this structure should be a “European centre of *expertise* on asylum”, responsible for facilitating, co-ordinating and strengthening practical co-operation among MS (recital 13 of EASO’s establishing regulation [emphasis added]).

In order to fulfil its current tasks, primarily corresponding to administrative co-operation support among EU countries and facilitated information exchange, the Support Office needs thus the adequate number of personnel as well as the necessary budget. As a result, national experts, which are seconded from MS, represent an important component within the Support Office’s overall staff structure, although the agency’s expertise has consequently always been highly dependent on the MS’ willingness to provide these experts. For instance, especially with regard to EASO’s task in providing support to MS that are facing particular pressure on their asylum systems, the Support Office can deploy special ASTs, which are however made up of experts from other MS. As a result, MS “can make autonomous decisions as to whether or not to deploy their experts” (Schneider and Graff 2018, 2).<sup>191</sup>

During the migration crisis of 2015-16, EU primary principals had to deal with the limits of their own capacities, which hampered the implementation of a common asylum policy. The problems EU countries had to face on the ground during the emergency revealed not only their own insufficient human and financial resources, but those of the Support Office as well.

The ‘Staff Regulations of Officials of the EC’, which have been in force since 1968, apply in general to all staff employed in EU agencies, including EASO (Article 38 of its 2010 regulation). EASO’s MB as the agency’s administrative organ, is its monitoring and planning authority taking decisions on the office’s staff. EASO’s staff composition presents similar categories as Frontex. The overall number of personnel at the agency’s disposal kept increasing at a continuous pace ever since 2012. Compared to the initial number of 16 total staff members in 2011, the registered increase of 2017 is the most evident (*Figure 5.1*), when

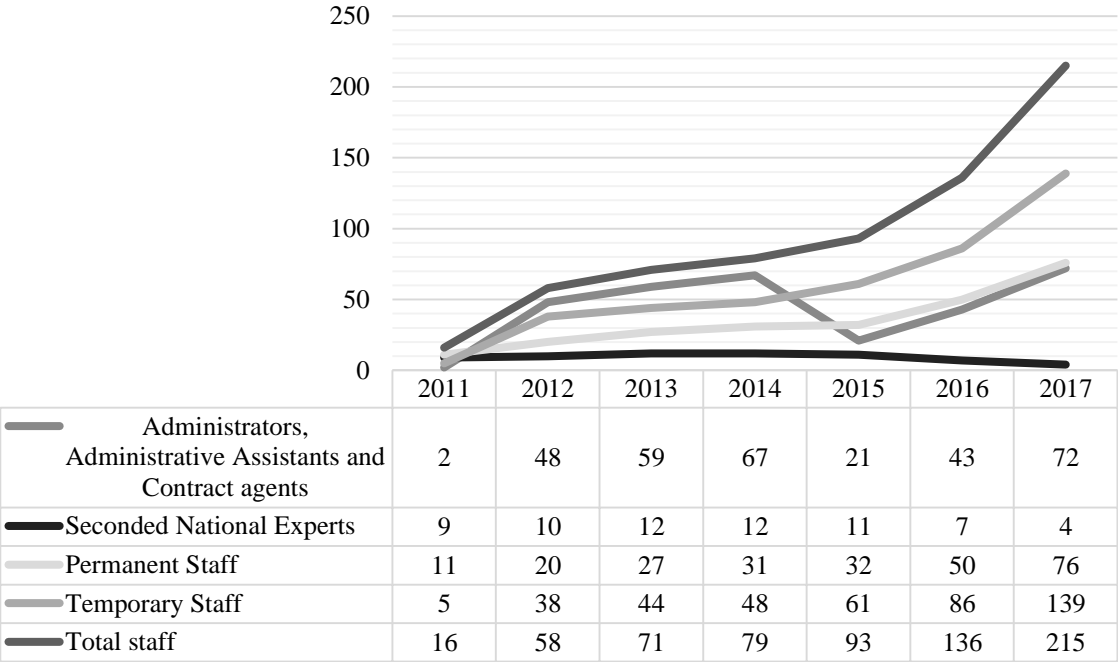
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<sup>191</sup> Up until 2018, six countries have taken advantage of this specific support, namely Bulgaria, Cyprus, Greece, Italy, Luxemburg and Sweden, although to very different extents (Schneider and Graff 2018, 2).



EASO’s total staff reached the unparalleled number of 215 officials coming from different EU MS. However, as in Frontex’s case, this increase did not take place during the peak of the migration crisis in 2015-16, when the Support Office would have needed it the most in the face of the emergency.

Figure 5.1 EASO’s Staff



Own elaboration. Source: EASO’s Annual Activity Reports until 2013 and General Reports starting from 2014

In 2016, EASO’s former ED, José Carreira, still lamented the lack of experts although the crisis had been ongoing ever since early 2015, emphasising on multiple occasions how this situation hindered an effective response to the crisis and stating that the situation in the hotspots needed to be reviewed. He specified that: “One of the issues is of course the capacity that we have on the ground particularly when it comes to [...] MS’ experts that continue to be an issue given the low numbers that we have on average available for our work. A strong appeal based on discussions and very clear explanations were done [...]” (EASO, 2016). This position was immediately shared by the European Commission, which underlined again the importance of solving the hotspot shortcomings faced in Italy and Greece (European Commission 2016a, 8–9).

During the Schengen crisis, EASO faced the same challenges and shortcomings as Frontex, although the border agency was soon better off after the adoption of its new regulation. At the end of 2015, in parallel to Frontex’s repeated requests, EASO had asked for additional 374 experts to be deployed at the hotspots in Greece, but received only 201 of them

(Agence Europe 2016a).<sup>192</sup> In late December 2015, the European Council had addressed this problem by stating that with regard to the unprecedented inflow of migrants which Europe was facing, “implementation is insufficient and has to be speeded up. [...It] is indispensable to regain control over the external borders. Deficiencies, notably as regards hotspots, relocation and returns, must be rapidly addressed” (European Council 2015c, 1). The unmet staff needs of EASO during the emergency, especially in the hotspots and at the EU external border with Turkey, were one of the major causes for the deficient response to the massive inflow of migrants between 2015 and 2016, which worked as an additional catalyst of the crisis. At the end of 2015, it was evident that insufficient staff was hindering an efficient solution at the EU Eastern and Southern border.

Similarly, in each hotspot – which had been established as an operational field for co-ordinated work between Frontex, EASO, Europol<sup>193</sup> and frontline MS, in order to enhance rapid action in identifying and registering migrants – implementation was extremely slow. The fact that the hotspot approach is still closely tied to a problematic and “unworkable” Dublin system (Carrera et al. 2015, 2) severely undermines the whole project. In order to solve this situation, the Commission advised EU and national officials present on the ground to address shortcomings in infrastructure and personnel (European Commission 2016a, 8–9).

Events like these suggest that an increase in staff and experts should simultaneously reinforce the agency’s ability to solve a crisis on the ground and make the agency more efficient in the implementation of its tasks (e.g. Hawkins et al. 2006; Parkes 2010). Nevertheless, over the past four years since 2014, EASO’s number of employed national experts (the SNEs) has actually decreased. Similar to other agencies, EASO is highly dependent on the availability of officials from the MS. During the 2015-16 crisis, the agency did not only declare to be understaffed, but specifically stressed that the procedure for the availability of ASTs needed to be improved (Ernst and Young 2015, iv). The decreasing number of SNEs could either signify an increasing supranationalisation of the Support Office’s staff composition (the expertise shifting from officials seconded from MS to the agency’s employees) or an increasing weakness of EASO, due to the declining number of national experts it can count on. Given the unanswered interview requests and official documents lacking this specific information, it was not possible to dig deeper into these

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<sup>192</sup> EASO received 46 asylum experts, 2 interpreters and 33 legal experts only from 16 MS (Agence Europe 2016c).

<sup>193</sup> Europol is the third agency supporting Frontex and EASO in the Greek and Italian hotspots. Although acknowledging the relevance of Europol in security related matters, this study focuses on the sub-policies of border control and asylum only, without including Europol.

numbers.

The creation of hotspots in Greece and Italy starting from 2016 had the most relevant impact on EASO's activity and related deployment of experts. EASO's staff did thus not only undergo changes in terms of numbers, but also in its *de facto* functions (Tsourdi 2016). EASO's annual report for the year 2016 stated that the Support Office had launched two operational offices in Athens and Rome respectively to facilitate its activity on the ground. The agency thus provided technical and operational support to these two countries via joint processing of asylum cases by its ASTs.

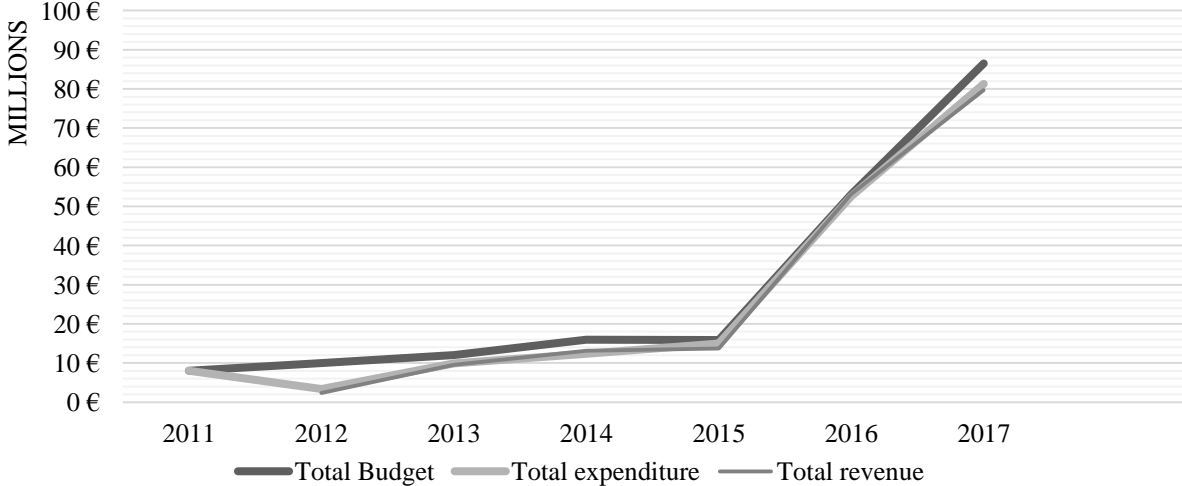
Against this backdrop, EASO-deployed experts at the Greek hotspots during the migration crisis started to independently conduct parts of the asylum process, in particular with regard to the admissibility of applications for international protection by TCNs. These administrative tasks carried out by EASO went beyond the mere assistance that the Support Office should have provided to the MS in question and moved towards "common processing" affecting EU administrative law. New procedures have thus emerged as *de facto* "composite, or mixed, administrative procedures" (Tsourdi 2016, 1024). Consequently, the national asylum decision-maker, e.g. the Greek Asylum Service, would *de facto* take her or his decision based on a recommendation from experts deployed by an EU agency, i.e. EASO.

With regard to this specific development of EASO's members of staff, concerns were expressed by civil society about their level of training and expertise, with specific regard to their lack of cultural sensitivity during interviews with refugees. The problem highlighted by several NGOs was that EASO's case-workers had expanded their remit beyond the limit of their mandate and without corresponding oversight or checks and balances being in place (Lovett, Whelan, and Rendón 2017). The 2016 proposal for a new EUAA was meant to close these gaps and give the agency an official mandate that would regulate its *de facto* expanded activity.

The Support Office is one of the youngest EU agencies. According to the historical events that accompanied its first four years of existence, not only its personnel resources but also its budget had a rather linear growth. In 2011 when the agency became operational for the first time, international events determined unexpected movements of populations on a large scale, which requested EASO's operational support (EASO 2012, 9). The agency started with a budget of approximately €8 million, a number that exponentially increased to €86,795,481 in 2017 as a consequence of the impending circumstances experienced by EASO during the Schengen crisis (*Figure 5.2*).

Prior to the migration crisis, the Support Office had already lamented its limited budget and staff. In 2012, which was also the year when EASO became financially independent, the budgetary authority, i.e. the Council and the EP as the agency’s intermediate principals, had adopted a budget of €10 million although EASO had requested €12 million. Accordingly, the agency “could only concentrate on small tasks” (EASO 2013, 6ff.). Again in 2015, the external evaluation, which had been carried out to assess EASO’s work, stressed that the agency had to “fulfil its mandate with relatively limited resources”, despite a progressively increased budget between 2011 and 2014 (Ernst and Young 2015, 13). The analysed data confirm, once more, that the larger the number of tasks, the higher the contributions in terms of budget and staff must be for the agency to perform such tasks.

Figure 5.2 EASO’s Budget



Own elaboration. Source: EASO’s Annual Reports, Final Annual Accounts, and Budget Documents

In 2017, the budget allocated to EASO initially amounted to €69,2 million, but soon a first amendment to the budget, was required providing additional €3,8 million EASO due to the costs “incurred by the operational support to Greece and Italy and in the area of training”. A further second amendment to the budget was necessary in September 2017, once it became clear that the operational expenses of the agency would exceed previous estimates. Hence, the budget was increased on another extra €13,78 million “in commitment appropriations” and €6,17 million “in payment appropriations”. This budgetary increase was once more required because of the implementation of relevant EASO training modules as well as further financial support to operations in Greece and Italy, where a high number of experts needed to be employed (EASO 2018, 14). The hotspots in frontline MS thus had a great effect on EASO’s work and resources. Whereas Frontex’s activity unfolded in various geographical areas *at* and

*beyond* the EU border, the idea of a new EUAA finds its roots primarily in the Greek and Italian hotspots.

Although the outlined increases in the agency's capabilities were substantial, these changes are still not sufficient to be defined as a significant agency empowerment. The growing budget and number of staff members were not followed by an official expansion of EASO's tasks nor of its issue scope through the creation of a new asylum agency, as demonstrated next.

### **5.1.3 The Support Office's Issue Scope**

The preamble of EASO's regulation officially maintains that the core of the office's work should be a close co-operation with MS' asylum authorities, national immigration and asylum services as well as other services. To that end, the Support Office has to draw on the capacity and expertise of national services and co-operate very closely with the European Commission. MS are in turn also requested to co-operate with the Support Office "to ensure that it is able to fulfil its mandate" (recital 9). From the very beginning, the establishing regulation's text thus reveals the Support Office's strong dependence on MS' services and capabilities and its tight ties to the Commission. As shown by the evidence collected, negotiations preceding the adoption of the 2010 regulation had already pre-announced the intergovernmental character of the future office and its consequent intrinsic weakness (for details see upcoming section 5.2).

Within its mandate and besides the tasks enlisted above, the Support Office has to provide technical assistance to MS through its 'asylum support teams', the mentioned ASTs. Specifically, these teams have to provide support, information and expertise "as agreed upon in the operating plan referred to in Article 18, in particular in relation to interpreting services, information on countries of origin and knowledge of the handling and management of asylum cases" (Article 14 of EASO's establishing regulation). Based on a proposal of the ED, the MB shall decide by a majority of three quarters "on the profiles and the overall number of the experts to be made available for the asylum support teams". The ASTs are then gathered within the Asylum Intervention Pool, in short AIP (Article 15), to which MS are bound to contribute via a national expert pool.

Although over the years some of the Support Office's units were moved, replaced or added (Interview with EASO Expert 1 2018), most of the units in place<sup>194</sup> are, as of today,

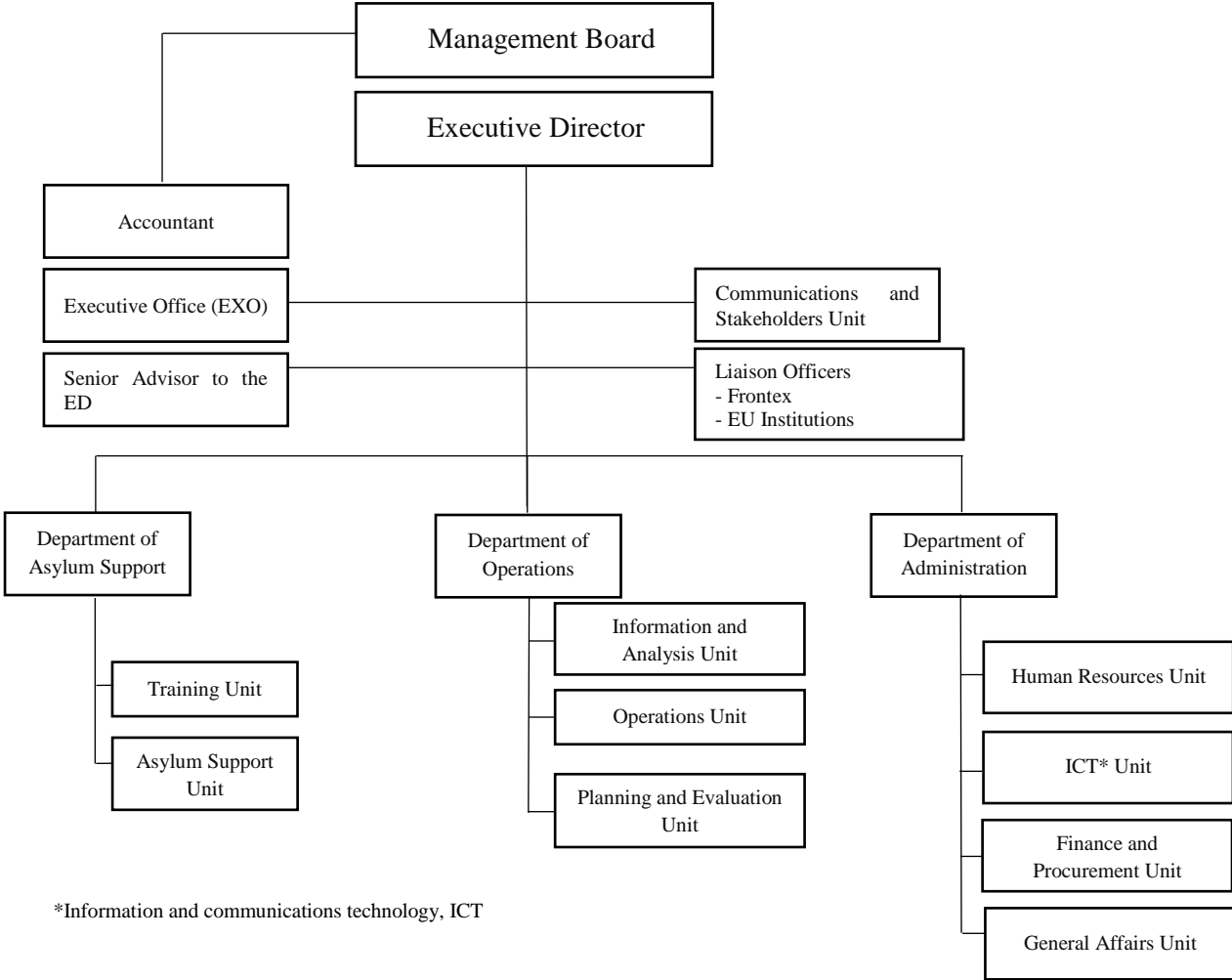
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<sup>194</sup> Specifically, Training Unit; Planning and Evaluation Unit; Human Resources Finance and Procurement Unit; General Affairs Unit.

vacant according to EASO’s official website. The difficulties encountered between 2015 and mid-2018 seem to have resulted, together with the resignation of the ED and the unbroken silence on behalf of the agency’s staff when trying to contact them, into a difficult and challenging period for the Support Office. This might correspond to a transition phase, the prelude to a soon to be approved reform. However, the current situation of EASO might also indicate a profound crisis of the office as such.

As presented in *Figure 5.3*, EASO’s activity is divided among three main departments, all dealing with support, which is mainly carried out through training, operational tasks, and administrative tasks. Hence, the mandate of EASO is limited by a small issue scope, which envisages merely training, information gathering and its circulation, as well as support on the field to pressured MS, but only if requested and under close national monitoring.

Figure 5.3 EASO’s Organisational Structure



Own elaboration. Source: European Asylum Support Office (2018)

In order to provide transparent information on countries of origin and adopt technical documents on the implementation of the asylum instruments of the Union (including guidelines and operating manuals), the Support Office may set up specific working parties. These working parties are composed of experts from competent MS' authorities operating in the field of asylum, including judges (Article 4(e), Article 12(2) and Article 32 regulating EASO's working parties). Again, the intergovernmental character prevails in the agency's original design.

In 2013, the Dublin III regulation, specifically Article 33, assigned some additional competences to EASO in relation to early warning, preparedness and crisis management in the field of asylum. Three years later, in 2016, the Commission would propose the creation of a EUAA to ensure that the mandate of the new agency would envisage the possibility of enhanced support in the case of emergencies (COM(2016) 271 final). This proposal stemmed from the Commission's intention to reform and improve the CEAS, by strengthening among other things the role of EASO, which would thus be able to co-ordinate information exchange among MS and ensure the protection of fundamental rights.

EASO's structural reform was started by ED José Carreira and was one of the most remarkable changes at the office since its creation (Interview with EASO Expert 1, May 11, 2018). The former ED, who was prior to this position Director of Frontex's Administration Division as well as previous Head of Administration of EASO, decided after his election by the MB in January 2016 to implement a structural reform of EASO (European Asylum Support Office 2016). He thus changed the 'old school' system in place, which had been set up and supported by the agency's first ED, the Dutch diplomat Dr. Robert Visser. Mr. Visser had surprisingly resigned three months before the end of his mandate (which, had he stayed, would have been extended for another three years) to serve a new position in the Netherlands (Cerulus 2015).

During the 5<sup>th</sup> Consultative Forum of EASO<sup>195</sup> in November 2015, Mr. Carreira, who was back then EASO's ED *ad interim* before his official appointment, stated that he aspired "to make EASO more operational and better equipped to quickly respond to the changing reality on the ground" (European Asylum Support Office 2015). The administrative experience of Mr. Carreira was a valuable precondition for digitalising the work of the agency and for delivering quick results. The new ED thus conveyed a good first impression on the EU by

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<sup>195</sup> According to Article 51 of EASO's regulation, the Consultative Forum Plenary Meetings are held by the agency, in order to foster a close dialogue between the Support Office and relevant stakeholders. The forum, which shall meet at least once a year, brings together organisations, academics and experts to discuss the CEAS as well as EASO's work and activities.

making proactive decisions and the investigation in which he was later involved (Barigazzi 2018) does not seem to have undermined the credibility of the systematic reforms he introduced. Despite these structural transformations, according to a former EASO official, Carreira lacked however the necessary specific asylum knowledge as well as “the will to acquire such knowledge”, in order to improve the overall work of the office (Interview with EASO Expert 1, May 11, 2018).

The process for the appointment of the second ED to come (see also COM/2015/20010) – as established in Article 30 of EASO’s regulation – was highly political. Eventually, EASO’s MB had to choose between two candidates: a German candidate, who was endorsed by his home country and the French government, and a Portuguese candidate, Mr. Carreira. According to the voting rules within the MB (Article 28 of EASO’s regulation), each member of the MB entitled to vote has the right to one vote, independently of the country’s share of population (which on the contrary matters for QMV within the Council). Therefore, even if the German candidate had the support of the most influential states, the Portuguese candidate, Mr. Carreira, was able to use his connections, which he had gained through his previous position at Frontex, to win the support of smaller EU countries and consequently obtain an absolute majority for his appointment (Interview with EASO Expert 1, May 11, 2018).

Although the previous ED, Mr. Visser, had been much more knowledgeable in asylum matters than his successor, the new Director impressed EU authorities with his swift action and ‘refreshing’ approach. Mr. Carreira created for instance a new “corporate communication department” to enhance communication within EASO. At the same time, some of the decisions the ED took during the 2015-16 “emergency”<sup>196</sup> had not been previously approved by the EU institutions in charge nor the MS involved (ibid.). For instance, one of EASO’s former officials mentioned the case of the Greek island Lesbos, where one of the hotspots advocated by the European Commission’s Agenda on migration had been established. Here, according to the interviewee, the ED decided first handed and without previous consultation with national authorities to invest part of the budget that had been made available to the agency by the European Commission to swiftly address the crisis in the acquisition of several new containers for the reception of asylum seekers, although no additional space was available on the island to set them up (ibid.).

Another relevant mistake in the opinion of EASO Expert 1 (2018) was to subsume the ‘asylum support unit’ under the ‘research and information unit’ instead of the operational

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<sup>196</sup> During the interview with EASO Expert 1, the interviewee explicitly referred to an EU ‘emergency’ rather than a ‘crisis’, because of the negative connotation the term had gained, in his opinion, across the public.



support one, which would have been a much more suitable and efficient match when carrying out operational tasks on EU MS' territory (e.g. in Italy and Greece). Despite these kind of mistakes, which occurred because of hasty and unilateral decisions by the agency's head, further important decisions taken by the agency's board seemed to compensate these errors, such as the acquisition of Eurodac machines by EASO for the collection of fingerprints on massive scale. EASO acquired Eurodac machines despite the fact that the related task did not fall under the agency's competences as set in its establishing regulation of 2010. As a follow up to these events and unsupervised actions, the MB introduced a steering committee that would analyse any document and issue upon which a decision had to be taken before these would be forwarded to the board (ibid.). Since EASO's Management Board's website has restricted access and the Support Office did not reply to any of the sent interview requests, it was not possible to countercheck this pivotal information gained during the interviews.

Before moving on to the principals' and agents' positions as well as to the analysis of the further identified explanatory factors of significant agency empowerment, namely the specific decision rules at the EU level, it is fundamental to briefly sum up the main changes the creation of the new EUAA would entail for the current mandate of EASO in terms of the issue scope. Besides the 2016 proposal, the European Commission carried out in 2018 an amended version of this document, which it submitted in Salzburg during the EU leaders' mentioned meeting (see section 4.3). According to the Commission's amended proposal (COM(2018) 633 final), the envisaged EUAA would constitute a reinforced structure with more tasks and capabilities. Besides co-ordinating information exchange among MS and ensure that they fully protect and respect fundamental rights, the new agency should also be provided with sufficient means to assist MS in crises, but also to *monitor* how national authorities apply EU legislation. The new structure would allow to circumscribe better the agency's activities, since in the past experts criticised duplications and overlaps with national authorities and other EU agencies, e.g. the FRA (Ernst and Young 2015, v).

After having outlined EASO's mandate in terms of tasks, capabilities and issue scope as well as the main changes that the creation of the EUAA would introduce in all of these components of the agency's current mandate, the next explanatory section traces the parts of the theorised causal mechanism seeking to open up the black box behind power delegation in the case of EASO.

## **5.2 The Causal Mechanism in the Case of EASO**

The Support Office started off its activity as an advisory body, an “ivory tower” where experts of asylum policy coming from the various EU MS would gather, collect information, and consult with EU institutions, primarily with the supranational agent *and* intermediate principal, i.e. the Commission. Over the years and especially after 2015-16, the role of EASO has drastically changed and the unprecedented events with which the EU was confronted transformed the agency into an “extended arm of the Commission”, an indispensable implementing body that would operate on the ground and get its hands dirty by being increasingly involved on the field (Interview with EASO Expert 1 2018).

The following sub-sections analyse first the scope conditions and the trigger of the hypothesised causal mechanism (as theorised in Chapter 3), in order to proceed then to the assessment of the involved actors’ positions and the decision-making steps towards significant agency empowerment. In order to assess whether a causality can be traced between the migration crisis and a significant agency empowerment in the sub-policy of asylum, this section follows the same steps as in the previous case study on Frontex. All parts of the theorised mechanism are hence traced in detail according to the three developed propositions (see sub-section 3.2.1). Whereas in the first part of the mechanism, the primary principals’ positions are expected to diverge, in the second part multiple agents are allegedly profiting from the deadlock situation resulting from these diverging positions to propose a reform of the agency in question. In the third part of the causal mechanism, intermediate principals are supposed to follow specific ‘unanimous’ decision rules, according to which all the involved actors in the decision-making, i.e. the Council and the EP as intermediate principals, need to jointly decide on the proposed reform and accordingly have the right to exercise their veto. In the final step of the mechanism, both primary and intermediate principals are assumed to adopt the regulation that would determine the significant empowerment of the agency under focus. Every part of the mechanism is expected to be sensitive to specific scope conditions, i.e. the shared competences and related interdependencies between the national and the supranational level that result from growing operational co-operation in a specific policy.

### **5.2.1 Scope Conditions and Crisis**

Long before the idea of an asylum Support Office would take form, primary principals had started to set some common guidelines in the field of asylum. An example is the 2004 Council directive laying down minimum standards for the reception of applicants for asylum in MS (Council of the European Union 2004h). Further developments led then to the establishment

of a CEAS, which the EU and its MS should have developed in two stages. Although the CEAS was finally established in 2013,<sup>197</sup> academia has widely criticised the huge gap between “practical capabilities and normative expectations” during the EU Schengen crisis, which ultimately jeopardised the legitimacy of the EU concept as a whole (Lavenex 2018, 2). The ‘refugee crisis’ laid bare the intrinsic weaknesses and defects of the CEAS. The system failed its most important test and was unsuited to stem the flow of migrants coming to the EU, although these were predictable events that could have been prevented. It was a governance crisis at its worst. Especially in the asylum policy area, the Schengen crisis, although it has officially ended, shows its reverberations in contemporary and still ongoing negotiations on a reform of the CEAS.

The almost exasperating impasse characterising negotiations on a reform of the CEAS signals the new alarming trend that could potentially lead from the EU as a regulatory state to a Union of ‘core state powers’ (e.g. Lavenex 2018; Genschel and Jachtenfuchs 2015). The following sub-section explores the CEAS and the related development of a common asylum policy in more detail, since both are specificities of the sub-policy the agency acts in and hence correspond to the scope conditions of the theorised causal mechanism. After having outlined the policy framework in which the Support Office acts, the analysis turns to the trigger of the causal mechanism, i.e. the Schengen crisis.

### ***5.2.1.1 Policy Framework***

The rationale behind asylum integration is the same as the one identified for the border control area: it became a necessary corollary of a free-border Schengen area. The end of the Cold war and consequent refugee flows had first brought the matter to the governments’ attention. Against the Schengen project, asylum co-operation represented an additional guarantee for internal security besides integrated border control.

After the enforcement of the Treaty of Amsterdam in 1999 and the Tampere Council held during the same year, “decision-making on asylum was not entirely communitarized” yet (Kaunert and Léonard 2012c, 9). Soon after, the sole right of initiative in the asylum policy area was bestowed upon the European Commission, although primary principals were still taking decisions by agreeing on the lowest common denominator “under unanimity voting requirements” in the Council (Thielemann 2013, 31). Given that, at the time, the Council had to take decisions unanimously on asylum related matters, the European Commission needed

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<sup>197</sup> For further details see the Council’s press release on the final steps towards a Common European Asylum System available online under <http://data.consilium.europa.eu/doc/document/ST-10411-2013-INIT/en/pdf> (last accessed on 10.10.2018).

to anticipate the position of the most “reluctant” MS in order to get its proposals approved (Lavenex 2001, 865). Consequently, before the introduction of the Lisbon Treaty, the overall expectation was that harmonisation in this field would be restrained and that only very low standards could be reached.

Later on, the Treaties of the EU clearly established that the development of a common migration policy should foresee not only a supranational led surveillance of the EU external borders, but also a common system for the regulation of asylum matters. The two Articles 78 and 79 TFEU rotate around the EU’s goal to develop a common policy on asylum and protection with a view to offering appropriate status to any TCN requiring international protection and ensuring compliance with the principle of *non-refoulement*. These two articles also envisage the development of a common immigration policy ensuring the efficient management of migration flows. Article 79(4) and (5) further ensure the MS’ right to determine “volumes of admission” of TCNs and that MS’ legislation on the integration of immigrants in their territory is excluded from harmonisation.

Ever since the Tampere Council of 1999, the EU has engaged in the creation of such an ambitious common project to regulate asylum issues. Two years earlier in 1997, the Amsterdam Treaty had conferred further competences to the EC in the area of asylum by envisaging an agreement on common minimum standards between MS for the reception of asylum seekers and for the related qualification of refugees (Parkes 2007, 2ff.). The major challenge for the establishment of a common asylum system still relates to the different asylum facilities and resources that each MS has at its disposal to implement the mentioned common standards. In particular, states as Greece and Italy have to struggle in this regard because of the dearth of specific resources within their national systems (see also Ripoll Servent 2018).

Asylum is not only a very sensitive political matter, but also an issue area where the domestic differences between the various EU countries are particularly evident. The EU and academia have continuously called upon the solidarity of MS, in order to achieve a ‘fairer’ responsibility-sharing<sup>198</sup> in the area of asylum. Since primary principals had agreed on the Dublin system, inequalities solidified between overwhelmed EU countries in the East and South on the one side and EU countries (mostly in the North) that were less embroiled in the challenges related to migration on the other. Weaker states in Southern Europe complained that although richer states (such as Germany) had pushed them to sign up for common EU

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<sup>198</sup> As Niemann and Zaun (2018, 5) rightly stated, one should write about a *responsibility*-sharing rather than ‘burden-sharing’ in order to refrain from defining asylum seekers and migrants as a burden.

standards in the realm of asylum, they had not received the necessary expected follow-up support (Parkes 2007).

At the beginning, the Dublin Convention was the bedrock of the EU asylum policy. The Convention was signed in Ireland in 1990 and entered into force in 1997. With an ever-changing Europe and existing imbalances between MS that were more exposed to migration flows (e.g. Greece) and other MS that were not, the Convention was subsequently replaced by two regulations. In 2003, the Council adopted the Dublin II regulation,<sup>199</sup> which was amended by both the EP and the Council in 2013 with the Dublin III regulation.<sup>200</sup> The latter was adopted by all MS with the exception of Denmark. These regulations should have ensured the respect of specific criteria and mechanisms for determining which MS is responsible for a certain asylum application. Furthermore, the effective application of the Dublin III regulation should have been facilitated by the introduction of the Eurodac system, which established the EU fingerprint database to identify asylum seekers and irregular border-crossers (European Parliament and Council of the European Union 2013b).

The other cornerstone for the development of a common asylum policy was the CEAS, whose key elements were negotiated from the first Schengen Agreement in 1985 onwards (for a more detailed account see Lavenex 2001). The CEAS needed to be built up on the 1951 Refugee Convention agreed on in Geneva as well as on the humanitarian values shared by all European countries. At the beginning, the harmonisation of MS' asylum law was pursued through intergovernmental co-operation under the 1992 Maastricht Treaty in the field of JHA (EASO 2016, 13). The Treaty of Amsterdam (1999) was then the first crucial step that paved the way for both the integration of asylum policy into Community law (as part of the broader immigration policies) and the creation of the Support Office. Once the AFSJ was established, any decision in the asylum area was to be taken by QMV in the Council and in co-decision with the EP (Comte 2010). Hence, with the Treaty of Amsterdam asylum became an area of supranational EU competence.

An additional pivotal step towards a further strengthening of a common asylum policy was the decision taken during the meeting of the European Council in Tampere in 1999.

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<sup>199</sup> The full title of the document is „Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national“ (Council of the European Union 2003c).

<sup>200</sup> The full title of the amended regulation is “Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (European Parliament and Council of the European Union 2013a).

During this summit, the back then 15 EU MS had welcomed the kick-start of the EU's JHA policies and issued a list of more than sixty points of action, for many of which they also established clear deadlines. The European Council thus set a 'milestone' by calling on MS and the EU institutions to develop common policies on asylum and immigration. This entailed the establishment of common procedures for immigrants and asylum seekers to obtain entry to all EU countries and closer co-operation with countries of origin and transit (European Commission 2002b). The Hague Programme action plan that the Council and the Commission had issued in 2004 foresaw the establishment of the whole CEAS by 2010 (Council of the European Union 2005b). The CEAS should have been subsequently built in two phases. The first phase comprised the adoption of four main legal instruments and was completed by 2007. These first four legal instruments<sup>201</sup> laid the foundations for the CEAS.

According to the Hague Programme, in the aftermath of this first phase the legal instruments foreseen for the second phase should then have been adopted by the end of 2010.<sup>202</sup> During the first phase of the establishment of the CEAS (1999-2007), the Council was definitely the dominant supranational institution (Zaun 2016). The other intermediate principal, the EP, had still a mere consultative role and in case of a unanimity vote any MS could raise its veto, thus sometimes frustrating the supranational actors involved in the decision process. In this regard, 'strong regulators' were often able, through the exercise of their veto power, to shape the EU policy-making in the area of asylum and to impose their higher standards on the so-called 'weak regulators' (see also Ripoll Servent 2018, who maintains that the Council is still split into this two categories of strong and weak regulators, respectively corresponding to northern and southern blocs, when it comes to asylum related matters).

In-between the Dublin II and Dublin III regulations, the Commission of the EC issued in 2007 its Green Paper on the future CEAS (COM(2007) 301 final), which evaluated the steps made so far by the EU and its MS towards such a system. The text of the Commission's Green Paper highlighted the main points that should have guided the second phase for the development of the CEAS. The main challenge that had emerged from the paper's text still

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<sup>201</sup> The four main legal instruments of this first stage for the creation of a CEAS were: (1) Regulation (EC) 343/2003 (the mentioned 'Dublin II regulation'), Directive 2003/9/EC ('Reception Conditions Directive'), Directive 2004/83/EC ('Qualification Directive'), and Directive 85/2005/EC ('Asylum Procedures Directive'). These legislative instruments aimed primarily at creating a system that would guarantee a high level of protection to persons that are in need of it "under equivalent conditions in all Member States while at the same time dealing fairly and efficiently with those found not to be in need of protection" (European Commission 2007).

<sup>202</sup> When the CEAS entered this second phase of harmonisation, some of the already existing legal instruments were amended (so called 'recast legislation'). New added legislation were the Eurodac regulation and the Dublin III regulation (EASO 2016, 16ff.)

regarded the parameters of co-operation and the implementing steps that needed to be taken. In order to foster practical co-operation among primary principals instead of just having an official rationale of co-operation in the matter of asylum, the European Commission stressed the need for a European administrative structure that had already been envisaged in The Hague. This structure would take shape into a European Support Office that would “systematically coordinate all the current activities of common practical cooperation” and help MS to address particular pressures on their asylum systems (COM(2007) 301 final, 9).

The Green Paper clearly stated how the future mandate of the asylum support structure should look like, but it was less articulated on the *actual* structure that should be chosen. Although the language on the future structure was vague, the European Commission stressed that “if” a “European support office” were chosen by MS as the ultimate solution, this new structure would systematically co-ordinate all the current activities of common practical co-operation (ibid.). By explicitly mentioning a Support Office, the Commission had thus implicitly communicated its preference. According to the EU Executive, the Support Office would have offered a training facility for all members and helped MS in addressing particular pressures on their asylum systems. Moreover, the Support Office would have monitored the implementation of the reception conditions of asylum seekers in the MS. All the tasks mentioned by the Commission in its Green Paper were later adopted in the 2010 regulation establishing EASO.

Whereas after Tampere the discussions in the JHA Council among the different interior ministers had been characterised by a predominance of the stronger and richer MS, such as Austria, France and Germany, the institutional setting in which the Commission released its 2007 Green Paper was different (see also Ripoll Servent and Trauner 2015). The most important changes regarded the EP, which by then already enjoyed co-decision rights over almost all aspects regarding asylum policy, and the European Commission, which had the sole right of initiative and thus higher influence on setting policy priorities. Moreover, the idea that common asylum standards and a consequent common system on asylum should be established was, by that time, generally accepted by a large majority of MS.

In sum, the two cornerstones of EASO’s establishing process were the Treaty of Amsterdam, which communitarised for the first time asylum issues, and the programme adopted by the European Council in The Hague in 2004. It was in The Hague that the still very vague idea preceding the creation of an asylum Support Office was mentioned for the first time although without actually referring to any concrete institutional form.

The so-called Dublin system is the further key legislative instrument impacting EASO's fate that needs to be taken into consideration. The mentioned Dublin Convention that was signed in 1990, almost concomitantly to the Convention implementing the 1985 Schengen Agreement, is additional evidence of EU MS pursuing internal security interests when it comes to migration issues. The Dublin Convention and the two Dublin regulations that followed it (in 2003 and 2013) were and are at the interface between the abolition of internal borders through the Schengen *acquis* and national concerns about secondary movements of asylum-seekers – sometimes defined as ‘asylum shopping’ (Biermann et al. 2017, 9). In order to counteract the possibility that asylum-seekers would profit from the abolition of internal borders and travel from one EU country to another, the envisaged Dublin system should have prevented any asylum applicant from submitting applications in more than one MS. The system should have further reduced the overall number of asylum seekers moving from one EU country to another. Accordingly, the Dublin system established that the country in which the asylum seeker first applies for asylum is responsible for either accepting or rejecting the claim, and the seeker may not restart the process in another jurisdiction. Hence, the country in which the asylum seeker first applies for asylum is responsible for processing the claim.

The main challenge of creating a common asylum policy is the (tragically) flawed sharing of EU values (cf. Lavenex 2001; 2018). The cleavage between ‘protecting’ and ‘protectionist’ practices has underlain the CEAS ever since it was officially included in the Treaties. As clearly stated in the incipit of a document issued by EASO itself in 2016:

“The CEAS is a legislative framework established by the EU. Based on ‘accordance’ with the Convention relating to the Status of Refugees (Refugee Convention) as amended by its 1967 Protocol, the CEAS regulates and sets common standards in the field of international protection with a view to developing common concepts and criteria, and harmonizing the interpretation and application of asylum law among EU Member States” (EASO 2016, 13).

The CEAS is thus closely intertwined with the idea of a common ‘European refugee policy’, which represents however still a chimera if one looks at the contemporary political status in the EU. The effective implementation of the CEAS has always been controversial, especially because of the mentioned Dublin system. In this regard, in 2004 the European Commission had issued a communication to the Council and the EP on the CEAS, whose core was to outline a study on the more efficient application of the system through the ‘single procedure’ (COM(2004)503 final). By *single procedure*, the Commission referred to the



single asylum procedure operated at the time of the 2004 communication only by Finland, France, the Netherlands, Sweden and the UK (and it should be explicitly noticed that these are only Northern European countries). The single asylum procedure would have allowed to increase *speed* and *efficiency* guaranteeing the consideration of all possible protection needs while a single authority would make a consequent single decision (see also Balzacq and Carrera 2005, 52ff.).

Against this background, the Commission had carried out a study on the asylum procedures of all MS and, based on this study, concluded that all countries members to the EU should embrace the single asylum procedure, which would be built on two cornerstones. First, the procedure would require the inclusion of all international protection grounds common to all EU MS; and second, it would put in place a system whereby an asylum seeker would have “only one chance to have a protection claim examined in a thorough, fair and just process in the EU” (Commission of the European Communities 2004a, 4). This last principle had already been enshrined in the 2003 Dublin regulation replacing the homonymous Convention.

In its key communication on the single procedure, the Commission further referred to the directive adopted by the JHA Council on 29 April 2004. This directive, the so-called Qualification Directive, established *minimum standards* for the qualification and status of TCNs and stateless people as refugees or as persons who are in need of international protection (Council of the European Union 2004h). That same year, the JHA Council had also reached political agreement on the amended proposal for a Council directive on minimum standards on *procedures* in MS for granting and withdrawing refugee status, i.e. the Asylum Procedures Directive.

The Qualification Directive of 2004 was substantially changed in 2011, right after the increase in migrants coming to the EU in the aftermath of the Arab Spring and has two main purposes. First, it should ensure that the EU MS apply common criteria for the identification of people in need of international protection and, second, it should guarantee a minimum level of benefits to these persons in all EU MS (Council of the European Union 2011b).

It is against this very complex legislative and regulatory system that the idea for an independent and depoliticised body tasked with the support to EU MS in the implementation of common practices and procedures started to take form.

In a document by the presidency of the Council on the draft conclusions on a single procedure for the assessment of asylum applications (Council of the European Union 2004i), the Council had already stressed the need for more practical co-operation and exchange of

information between MS for the implementation of the CEAS. In this context, EU institutions proposed to set up a Support Office to enhance “practical cooperation on asylum matters, and help member states fulfil their European and international obligations to give protection to people in need”. Both the Coreper and the SCIFA were not only involved in the development of Frontex, but also in setting the stage for the establishment of the Support Office. The envisaged office should help MS especially in cases of “unexpected influxes of migrants” and accordingly deploy expert teams in those MS with the most pressured and consequently vulnerable asylum system (e.g. Greece) (Agence Europe 2011a).

Moving on to the challenging years of the Schengen crisis, a 2016 document evaluating the Dublin III regulation allows to better understand the scope conditions necessary to ultimately determine significant agency empowerment as the outcome allegedly triggered by the crisis. The European’s Commission (first) proposal for a new EUAA was presented right after the Commission’s DG HOME had published on 18 March 2016 an evaluation of the implementation of the Dublin III Regulation (DG Migration and Home Affairs 2016). This evaluation called for an amendment of the regulation given the identified shortcomings in the primary principals’ practical implementation. The study included findings from all EU MS as well as three associated countries and explicitly mentioned EASO as one of its main sources for data collection, although at the same time lamenting the difficulty encountered in collecting information on the issues involved (ibid., 2ff.).

One of the first shortcomings the evaluation mentioned was the very different implementation of the Dublin III regulation throughout the various MS. Whereas countries as Austria, Denmark and Germany could count, for instance, on specific ‘Dublin units’, other countries as Italy have existing national authorities dealing with Dublin specific cases. The regulation itself does not provide specific organisational requirements for the implementation of its content in the single MS, an implementation that is consequently not co-ordinated and at times inadequate.

The second problem the evaluation highlighted was the limited availability of human resources as well as the ineffectiveness of training (primarily conducted through EASO). The limited availability of resources during the 2015-16 migration crisis was not only a problem emphasised by national authorities, but also by NGOs, which in the cases of Greece and Italy criticised that such capacity problems had often risked to hamper asylum procedures. Due to the mentioned limitations, some MS, as for instance Greece, complained about their difficulty in meeting the obligations laid down in Dublin and expressed their wish to receive more intense and tailored training.

The third major challenge was related to Article 3 of the Dublin III regulation, which establishes which MS are responsible for the asylum application of a TCN. This remains the crucial point inducing NGOs to ask EU institutions for a replacement of the Dublin regulation with a more equitable system.

The asylum policy is officially a policy of shared competence between the national and the supranational level, but most of the competences still lie, as this section outlined, with the primary principals. Hence, the role of supranational bodies as EASO, in charge of increasing integration and co-operation in this policy area, appears to be quite limited, as is the primary principals' acknowledgement of the Support Office's relevance in supporting and advancing co-operation.

#### ***5.2.1.2 The Trigger of the Causal Mechanism: The Crisis***

This section analyses the hypothesised trigger leading to a significant empowerment of the Support Office, namely the migration crisis. During the crisis, the Dublin system revealed itself as an anachronistic solution to a highly complex situation, which would have required instead a just and fair sharing of responsibility among EU MS rather than a reinforcement of the *status quo*. The crisis thus exposed the cleft between those countries in Southern Europe (primarily Greece and Italy) that are heavily confronted with migratory flows as well as the bureaucratic burden that accompanies them, and the rest of EU MS that are more advantaged because of their geographical position and their developed regulatory systems.

Media and academia abundantly lamented during the Schengen crisis the prioritisation of national interests *versus* the protection of migrants' and refugees' rights, a trend that had started to reveal itself before 2015 (e.g. Lavenex 2018; Robinson 2015). A paramount example in this regard is the recast of the Dublin II regulation. Although the ECJ had in 2011 ruled that transferring asylum seekers back to Greece by following the Dublin rules would endanger them and the transfers had been consequently suspended, the Dublin system as such was "not called into question". Despite protests over the years of multiple civil society organisations, the Dublin system persisted (Ripoll Servent and Trauner 2015, 37).

One of the numerous anticipations of the swift collapse of the EU asylum system can be identified in the abrupt interruption of the Italian SAR operation '*Mare Nostrum*', substituted by the Frontex-led *Triton* JO, which had a much more limited budget and mandate than its

predecessor (Lavenex 2018).<sup>203</sup>

Before analysing the positions of the different principals and agents as well as the discussions between the EU legislators on the long debated EUAA proposal, it is essential to outline the main external event that allegedly paved the way to such a legislative step.

During the 2015-16 emergency, MS were divided on multiple issues, which can be nevertheless reduced to two main controversies. First, the EU *North-South* cleavage, which was also referred to by scholars as the conflict of strong *versus* weak regulators (Ripoll Servent 2018). This cleavage was visible in the tensions that escalated in the early months of 2015 between frontline MS (e.g. Greece) and other EU countries, the latter accusing the former of deliberately ‘waving through’ migrants and thus not implementing the Dublin regulation (e.g. Biermann et al. 2017, 9; The Federal Government of Germany 2016).

Second, the EU’s *East-West* cleavage, since after MS had agreed that more solidarity<sup>204</sup> and shared responsibility were needed, Eastern European countries lacked the will to co-operate and did not meet European requests.

Disputes had underpinned negotiations on a common migration policy and a common asylum system ever since the establishment of the Schengen area and the signing of the Dublin Convention. This discrepancy between a supranational Schengen system on the one side and lack of co-operation between EU countries on the other crystallised itself during the migration emergency (see also the mentioned contribution by Niemann and Speyer 2018). Once the number of asylum seekers illegally reaching the EU increased dramatically at the beginning of 2015, the Council reacted by announcing a three pillars approach. The approach would aim at (1) boosting co-operation with third countries, (2) strengthening the border control agency Frontex, and (3) fully implementing the CEAS (Council of the European Union 2015b). In order to follow-up on the Council’s approach, the European Commission presented in April 2015 the ten point plan of immediate actions (mentioned already in sub-section 4.2.2.2) to be taken in response to the crisis. The Commission’s plan included for the first time a “commitment to consider options for an emergency relocation mechanism” (European Commission 2015c, 9). A month later, in May 2015, the supranational agent presented its comprehensive European Agenda on Migration, which set down *inter alia* the

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<sup>203</sup> The *Triton* operation was launched in November 2014. It replaced, according to the EU’s official report, two former JOs also co-ordinated by the border agency, namely 2013 JO *Hermes* and JO *Aeneas*. Compared to these two former operations, the budget and mandate of the *Triton* operation appeared as an enormous step forward. In this context, however, Frontex’s General Report of 2014 did not even remotely mention the much more relevant SAR operation *Mare Nostrum* in the Mediterranean Sea.

<sup>204</sup> Solidarity is enshrined in Article 222 TFEU as one of the fundamental principles and has been phrased as the ‘solidarity clause’.

EU duties to *relocate* and *resettle*, proposing numerous measures in order to offer a swift response to the Schengen crisis. The Agenda set specific goals, including reinforced assistance to frontline MS through the creation of hotspots in Greece and Italy and the reinforcement of the CEAS by reforming the Dublin regulation (Geddes 2018, 122–24).

Upon this plan, all EU MS were advised to show first solidarity to the two countries facing the emergency, i.e. Italy and Greece, and then agree to accept eligible asylum seekers in need of international protection in their national territory (for further information see also European Commission 2017d). To achieve these objectives, the 2015 Agenda had already set out the distribution criteria for calculating specific quotas and accordingly relocate asylum seekers across EU countries. The established distribution criteria would thus include the MS' GDP, size of population, the countries' unemployment rate as well as past numbers of asylum seekers and resettled refugees. These measures set the groundwork for the so-called temporary *relocation* system to help Italy and Greece in the short-term. In addition to the relocation of those already on EU territory, the European Commission called in its Agenda on all EU MS to provide legal and safe pathways to TCNs “in clear need of international protection” to enter the EU and announced to dedicate funding of an extra €50 million in 2015-16 to support a subsequent resettlement scheme (European Commission 2015b, 4–5).

*Resettlement* refers to this additional comprehensive commitment that the EU should have taken jointly according to the same abovementioned redistribution key applicable to both relocation and resettlement procedures.

The hurdles and challenges which the asylum policy is fraught with since the very beginning of its communitarisation and the events that followed the Schengen crisis, set the ground for specific positions and follow-up decisions on behalf of the EU principals and agents, as outlined in the following.

### **5.2.2 Principals and Agents towards Significant Agency Empowerment**

The establishing phase of EASO between February 2009, when the Commission presented its proposal (COM(2009) 66 final), and May 2010, when EASO's regulation was eventually adopted, was characterised by rather limited debates, mainly regarding the future structure of the agency. Overall, negotiations were quite swift compared to those on the 2016 proposal for a new asylum agency (more details follow in sub-section 5.2.3). Although the Support Office falls under the category of regulatory agencies, it yet represents a peculiar institutional entity and does not count as a fully-fledged agency. Accordingly, in its founding regulation it is never explicitly referred to as ‘agency’ but as ‘Support Office’ only. It is nevertheless an

entity with its own legal personality and accordingly independent from the Commission or any other institution.

The following analysis presents the positions and activities undertaken by the primary and intermediate principals as well as multiple agents during the establishing phase of EASO, in order to then move to their positions and activities right after the outbreak of the Schengen crisis. The analysis thus aims at tracing the decisive parts of the causal mechanism allegedly leading to a significant empowerment of the Support Office.

### ***5.2.2.1 Primary Principals' Positions***

In order to understand the positions of the EU MS with regard to the EUAA proposal of 2016, preliminary knowledge of the previous positions held by EASO's primary principals during the phase preceding the creation of the Support Office is due. Moreover, given the complex reality of the EU asylum policy and the related primary principals' positions during the Schengen crisis, it is difficult to clearly analyse each part of the causal mechanism separately. The expected diverging positions among the primary principals are intertwined with the positions of the EU supranational institutions and it is consequently not always possible to subsequently trace them and keep them apart.

Primary principals initiated in 2009 the process for the establishment of a European Asylum Support Office (European Commission 2009b). Their aim was to harmonise not only the MS' laws, but also national practices across the EU in the asylum area. Similarly to Frontex's case, MS representatives pushed for reforms through their heads of state and government sitting in the European Council, but seemed then to disagree on the details of how such a reform should look like. At the end of 2009, primary principals stressed a renewed commitment of the EU to develop a “ forward-looking and comprehensive European migration policy [...and to achieve the effective] implementation of all relevant legal instruments” including all relevant agencies and *offices* (European Council 2009b, 11). In the European Council, primary principals thus reiterated that they would prioritise the establishment of a CEAS in 2012 and of common asylum procedures for all MS. Prior to the entry into force of the Lisbon Treaty, in 2008 the European leaders had already signed the European Pact on Immigration and Asylum upon a French proposal. The pact called for a better management of immigration and should have been the basis for EU immigration and asylum policies “in a spirit of mutual responsibility and solidarity between Member States and a renewed partnership with non-EU countries” (Council of the European Union 2008, 4). The

European Council, thus, set the guidelines and paved the way for the future establishment of the Support Office.

Since EASO was among the first JHA agencies to be established under the COD involving the EP as well (Trauner 2012), back in 2010 both intermediate principals, the Council and the Parliament, adopted together the regulation establishing the European Asylum Support Office. Back then, high expectations had been raised about the new Support Office, given the announcement that EASO would play an important role in helping to construct a CEAS founded on high standards of protection as well as in enhancing the quality of a strong EU asylum system (European Council on Refugees and Exiles 2010). The same optimism underlays Comte's publication, since the agency was created rather unexpectedly in a highly political and sensitive sector (Comte 2010, 404).

The idea for a Support Office in the asylum realm took form within a major project launched in the Stockholm programme (see also sub-section 4.2.2.2), specifically in its point 6, which was entirely devoted to the idea of "a Europe of responsibility, solidarity and partnership in migration and asylum matters" (European Council 2009a, 27). Primary principals had emphasised in the document that the establishment of a CEAS by 2012 would remain a key policy objective for the EU. The intermediate principals, i.e. the Council and the Commission, were accordingly invited to enhance co-ordination between the external and internal elements of the work in the AFSJ, including improved coherence and co-ordination between Union agencies.

Primary principals endorsed the creation of a Support Office ever since the European Council's meeting in The Hague. In 2008, the JHA Council of ministers joined the European Council's project and asked the Commission to submit a study identifying the conditions necessary for the establishment of EASO.<sup>205</sup> The Commission's proposal for a regulation setting up EASO was negotiated on very quickly. The document was presented in February 2009 and adopted jointly by both intermediate principals, the EP and the Council, already in November of the same year. This short period of time leading to the adoption of the Support Office's establishing regulation is indicative of primary and intermediate principals being fast in reaching a compromise on the two main elements under discussion, i.e. the institutional *structure* of the future body and the *content* of its mandate. This swiftly reached compromise among primary principals as well as between the Council and the EP was also a symptom of the limited powers that were delegated back then to the Support Office. If far-reaching powers

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<sup>205</sup> See the Council's conclusions on practical cooperation in the field of asylum of 18 April 2008 available online under [http://www.eu2008.si/en/News\\_and\\_Documents/Council\\_Conclusions/April/0418\\_JHA3.pdf](http://www.eu2008.si/en/News_and_Documents/Council_Conclusions/April/0418_JHA3.pdf) (last accessed on 3.2.2019).

had been envisaged for the office, an agreement between the different principals would have probably not been that fast (as the analysis on the EUAA proposal shows below). Instead of choosing one among two extreme options, every actor involved in the establishing process agreed on setting up a Support Office. The two ultimate alternatives would have been either to maintain existing structures, namely the asylum unit within the correspondent DG for Justice Freedom and Security of the European Commission, or to create a *decisional* European regulatory agency. Since the EU primary principals were still clearly against an enhancement of the supranational agent's powers and did not wish to renounce to their decisional powers in asylum related matters, the only feasible solution was the one adopted: the establishment of a (fledgling) regulatory agency.

The creation of such a weak structure and the primary principals' apparent intention to keep it as such (even after the migration crisis) seem to be at odds with the initial ambition that drove EASO's establishment in the first place, namely to enhance co-operation in asylum related matters and supranationalise this sub-policy further.

Eventually, in 2010 negotiations ultimately resulted in the establishment of EASO, although the idea of a regulatory agency was not immediately welcomed by all actors. Some MS, as for instance Germany's and the UK's representatives within the Council, remained sceptical about the creation of such a new body (Comte 2010).

The final version of EASO's regulation established that since not all MS participate in the same way in the EU *acquis* on asylum, they would accordingly co-operate in a different manner with the Support Office. As outlined in the previous case study on Frontex (Chapter 4), Denmark has a special status within the common migration policy, since it co-operates with the EU exclusively through international agreements on asylum that concern the Dublin and Eurodac regulations.<sup>206</sup> One should bear in mind that Denmark is in a so-called 'opt-out situation', following which it did not take part in the adoption of EASO's regulation and is consequently not bound by it. Nonetheless, Denmark co-operates within the common area of asylum with the other EU MS and EASO has accordingly to 'facilitate operational co-operation with Denmark, including the exchange of information and best practices in matters covered by its activities'; it should further invite a Danish representative to attend all the meetings of the MB (recital 23 of EASO's regulation; Comte 2010, 391). For Liechtenstein,

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<sup>206</sup> In the 2009 regulation proposal, the European Commission had referred to Denmark as an associated country. During one of the many negotiations on the future regulation establishing EASO, the country's delegation had however announced that it "refused to be treated as an associated country, arguing that it is a Member State of the EU" (Comte 2010, 391).



Iceland, Norway and Switzerland, according to EASO's 2010 regulation the agency is open to their participation in the MB as observers (Article 49(1)). Ireland and the UK, as in the case of the border agency, can exercise an *opt-in* right, as a result of what is called the "variable geometry"<sup>207</sup> in the EU *acquis* on asylum. Consequently, in May 2009 (not yet under the Treaty of Lisbon and therefore still under the Treaty of Amsterdam) the UK and Ireland exercised their opt-in right and asked to participate in the adoption and the implementation of the EASO regulation.

Especially in a sensitive 'core state power' realm (Genschel and Jachtenfuchs 2018) as the one regarding asylum issues, where a general decision at the supranational level can have major unpredictable consequences on the domestic one, politicisation harbours uncertainty, in particular after a crisis. Despite the creation of EASO, problems of solidarity and responsibility-sharing continued to remain present. States as Spain, Italy and Greece had tried, since the negotiations on the Dublin II regulation of 2003, to draft a compromise that would lead to a fairer responsibility-sharing in asylum applications (see Aus 2008). Nevertheless, these initiatives were mostly boycotted by Northern EU MS, which kept even during the Schengen crisis the Mediterranean countries at bay (Ripoll Servent 2018).

In the asylum policy, primary principals can be categorised in strong and weak regulators. The former are those core EU MS that due to their history of immigration have been able to build strong regulatory frameworks and institutions to process asylum applications (e.g. France, Germany, the Netherlands, Sweden and the UK). Conversely, weak regulators are those MS with less effective administrations and frail asylum systems (e.g. Greece, Italy and Portugal). During the development of the (still not fully integrated) EU asylum policy, weak regulators were considered less legitimate to propose reforms, due to their limited national capacities. At the same time, the inherent administrative weakness of these MS represents their blind spot with regard to any reform, since these countries have to incur higher costs when it comes to the implementation of decisions agreed upon at the EU level (*ibid.*, 7).

Although EU funds have been created throughout the years to assist MS in developing an efficient asylum system (for instance the European Refugee Fund, ERF, which was replaced in 2014 by the AMIF, mentioned in sub-section 4.1.2), they do not guarantee enough support when it comes to face the additional arrival of irregular migrants (see also D'Alfonso 2015).

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<sup>207</sup> This concept describes the idea of a method of differentiated integration in the EU. To Comte (2010, 390), the term is suitable to describe also the fact that not all MS participate in the same way in the EU *acquis* on asylum.

In early September 2015, the EU Executive proposed an emergency mechanism to relocate from Greece and Italy 120,000 people in need of international protection *on top* of the 40,000 that it had proposed in May (European Commission 2015e). This measure was taken in order to help the most affected countries, namely Greece, Italy and also Hungary. Following this proposal, France, Germany and Spain committed themselves to take the highest numbers of displaced people. However, primary principals continued to disagree and no consensual decision on the resettlement of 120,000 asylum seekers within the EU could be reached (further details follow in sub-section 5.2.3).

Primary principals repeatedly showed their lack of consensus on asylum related issues, which had major reverberations on the 2016 Commission's proposal for a new EUAA through the subsequent Council's discussions. This bleak situation led not only to greater discrepancies between frontline states in Southern Europe, whose bureaucracies were crushing under the enormous weight of asylum applications, and MS in the North and East of the EU. The crisis additionally determined frictions between the supranational agent and its primary principals, as for instance when the Commission launched a legal case against the Czech Republic, Hungary and Poland for refusing to take in refugees.

In April 2017, the European Commission stated that Austria, Hungary and Poland were the only MS that had not relocated a single person, thus breaching their legal obligations and commitments towards Greece and Italy. Moreover, the Czech Republic had not been active "in the scheme for almost a year" (European Commission 2017b). These countries' actions (or rather lack of action) continued to represent an obstacle to the fair sharing of responsibility in the EU asylum policy to which primary principals had actually committed. Relatedly, the European Commission had also called on Hungary and Poland to start relocation and on the Czech Republic to immediately *restart* relocation. At the same time it urged Austria, which had started pledging to help Italy, to do the same for Greece.

Against this background, in June 2017 the Commission launched the mentioned infringement procedures against the Czech Republic, Hungary and Poland (European Commission 2017c). The statement of the Czech prime minister, Bohuslav Sobotka, claiming that the Commission was insisting on the introduction of 'dysfunctional' quotas, thus decreasing citizens' trust in the EU abilities to solve the migration crisis, was indicative of Eastern MS' discontent (Wintour 2017) as well as the national trend to undermine the authority of EU institutions (cf. Agence Europe 2016d).

The sensitive situation led to autonomous actions from the strongest primary principals of the EU, namely France and Germany. In 2015, German Chancellor Angela Merkel met with

the French President François Hollande to find a quick bilateral response to the migration crisis. At this point, both France and Germany seemed to take over political leadership by calling for a “unified” European response to the crisis, addressing all EU MS to “work together” towards a common solution (Agence Europe 2015h). Apart from Germany where Angela Merkel strongly supported an open-door refugee policy, Northern, Central and Eastern-European countries showed less solidarity. Although some of these states had raised their EU budget contributions as requested in order to tackle the migration crisis at the common borders, little was done to equally redistribute the exponential number of refugees entering the EU and to effectively help the more troubled Southern EU MS.

Consequently, no compromise could be reached on a common policy to respond to the migration crisis. The crisis displayed not only the North *versus* South and strong *versus* weak cleavage, but also the ongoing East-West split. During negotiations on common asylum solutions, the Visegrad Four group (the Czech Republic, Hungary, Poland and Slovakia) was the strongest opponent of the relocation of asylum seekers among MS. Hence, before the supranational agent could propose a strengthened Support Office, the primary principals’ bargaining process to minimise the migratory flows and the consequent number of relocations continued, exacerbating the relations not only between the primary principals themselves, but also between national delegations and the EU intermediate principals. Against this backdrop, MS were openly criticised for their inability to reach a common solution (Agence Europe 2015i).

Specific power politics thus underlay the relation between strong and weak regulators. Not only did these power politics matter before and during the Schengen crisis, but they still matter greatly in the contemporary EU. Divisions continue for instance to exist between France and Italy, since France keeps pressuring the Italian government to exert preliminary control at its borders on potential asylum seekers and swiftly process their requests (Agence Europe 2017b). This suggests an unbalanced responsibility shift, since the Italian administration has been struggling for years with enormous numbers of asylum applications.<sup>208</sup> Some authors even stated that countries such as Greece and Italy have been for years “under siege from migrants” (Geddes and Scholten 2016, 175). One should also bear in mind that power politics influencing the EU landscape during and after the crisis reflect domestic ones, where populist, nationalist, and anti-immigrant parties continued pressuring governments against solidarity policies (see for example the rise of the *Alternative für Deutschland*, AfD in Germany or the re-vitalisation of Geert Wilders’ Party for Freedom in

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<sup>208</sup> For detailed numbers see Fondazione ISMU (2017).

the Netherlands and of the *Lega Nord*<sup>209</sup> in Italy). In the aftermath of these events, Germany strongly supported the Commission's efforts announcing that without an agreement on the fair distribution of asylum seekers between EU countries, the future of free movement within the Schengen area would be threatened (Agence Europe 2015f).

Primary principals had acknowledged on multiple occasions the significance of EASO in supporting national authorities in relocation and resettlement matters. It seems therefore odd that EU MS had agreed in 2010 to establish a support office to keep the remit of its mandate sub-optimal, when in fact its role has (especially after the Schengen crisis) outgrown its mandate, making a reform inevitable. National opposition to the relocation system and consequently to a future reform of the so-called Dublin system (which is also closely intertwined with the development of a common management of the EU external borders) is however indicative of the diverging positions among primary principals on asylum related matters and their limited participation in the related supranational co-operation. Primary principals thus remained "reluctant to move beyond very weak harmonization" in asylum policy (Ripoll Servent and Trauner 2015, 42), thus impeding swift political action to respond to the Schengen crisis and challenging the further steps taken by EU institutions to pass specific reforms as the transformation of EASO into a new EUAA. Before moving to the decision-making steps towards significant agency empowerment in the asylum policy, the next sub-section presents the positions on the matter of the intermediate principals and multiple agents involved in the process.

#### ***5.2.2.2 Intermediate Principals' and Multiple Agents' Positions***

This section analyses the positions of the EU intermediate principals and multiple agents throughout the history of EASO. Understanding the development of these actors' positions over time allows to better grasp their role in the causal mechanism's steps towards a significant agency empowerment. Therefore, after analysing the intermediate principals' and multiple agents' positions during the establishing phase of EASO, the section explores their positions during the Schengen crisis of 2015-16.

The Support Office was established after the Lisbon Treaty and hence through a regulation that was adopted by both its intermediate principals, namely the EP *and* the Council. EASO was thus one of the first agencies to be established under the co-decision procedure involving both actors. The further intermediate principal of the agency, the

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<sup>209</sup> In 2018, the party changed its name from 'Lega Nord' to 'Lega'.

European Commission, had always been in favour of advancing integration in the asylum sub-policy. However, during the negotiation process on EASO in 2009 the EU Executive had moved its position closer to those of its primary principals to reach a supranational compromise, given the strong reluctance of EU countries to give up sovereignty on asylum related matters.

The European Commission had actively participated in setting the stage for the future Office and thus expanding the EU multiple agents' range of action. In June 2008, the supranational agent had released a communication on a policy plan entitled "Asylum: an Integrated Approach to Protection across the EU" (COM (2008) 360 final), which announced the EU's and specifically the Commission's intention to revise legal instruments for the implementation of the CEAS and strengthen support for practical co-operation between the MS by establishing a Support Office. The document stressed further that given positive reactions to the Commission's Green paper of 2007, the idea of creating a structure to support asylum activities in the form of a Support Office had received the necessary endorsement of the primary principals. The Commission had started to work on a Support Office for asylum already in 2006, right after the European Council meeting in The Hague. At that time, the EU Executive had issued a document that aimed at presenting to the Council and the EP "new structures, new approaches" in the CEAS (COM(2006) 67 final, 8ff.). This document is not only relevant because it represents the first step taken by the Commission to establish a Support Office, but it presents a further interesting detail. In this 2006 document, the European Commission had already predicted that the practical demands for asylum co-operation in the EU would probably exceed the capacity of an asylum co-operation network – which had been initially signalled as an alternative option to the establishment of a Support Office. As a result, the Commission announced that it would study feasible options to enhance practical co-operation towards the CEAS and further assess the necessary funding to reach such an objective. This feasibility study on the establishment of a European Asylum Support Office should have been carried out before the early months of 2008, after primary principals would have agreed on a common asylum procedure as envisaged by the Hague programme. As a result, in 2009 the European Council called on all MS to reach an agreement on the future office within the year.<sup>210</sup> After long discussions among primary principals regarding the institutional form this new EU body should take, in 2010 the Regulation (EU) No. 439/2010 set up the new EASO.

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<sup>210</sup> See the Council's conclusions of 29-30 October 2009 available online under <http://data.consilium.europa.eu/doc/document/ST-15265-2009-INIT/en/pdf> (last accessed on 10.5.2019).

Besides the possibility of creating a regulatory agency, the other options that were being weighed corresponded to an upgrade of the asylum unit within the European Commission as the EU supranational agent; the establishment of an executive agency to which powers would be delegated *directly* from the Commission as an intermediate principal; or the creation of a co-ordinating network. All these options were ultimately discarded. The reasons were either political (in particular because of the mentioned primary principals' reluctance to enhance their supranational agent's powers in a core policy area) or efficiency-related (Comte 2010; Tsourdi 2016). After consulting numerous stakeholders on the future architecture of the CEAS, the Commission thus presented the preferred policy option, i.e. the creation of a European Asylum Support Office. Although this option was the most expensive solution in financial terms, it was regarded as the most efficient one to achieve the set objectives and as the most feasible compromise (Commission of the European Communities 2009a).

The further intermediate principal of EU migration agencies, the EP, was also involved in the establishment process of the Support Office and did not immediately welcome the proposal of the Commission (European Parliament 2009). The EP shifted its position substantially in asylum related matters between 2005 and 2012. Whereas in the past it had taken an independent stand from the Council and had championed rather liberal positions, it became over time more restrictive especially on topics regarding for instance the possibility to reduce or withdraw reception conditions (Ripoll Servent and Trauner 2015, 42ff.). At the same time, the EP has always been in favour of an increased harmonisation of the asylum policy and a strengthening of common standards, in order to restrain the primary principals' 'flexibility' on the matter.

With regard to the 2009 EASO proposal, the EP suggested in a report several amendments, including its own involvement in the selection of the candidates proposed for the position of the ED and an addition in the regulation's text that EASO would work "within the scope of international instruments on protection and human rights as well as the EU *aquis*" (European Parliament 2009, 25). Moreover, according to the EP the overall text of the regulation should have defined more clearly what the envisaged co-operation between the Support Office and third countries would actually entail. It should have accordingly ensured that the information gathered on countries of origin (which represents one of the office's pivotal tasks) was drawn from relevant and trustworthy expertise in a transparent and impartial way. The EP's rapporteur asked further in the same document for an expansion of its role in monitoring and overseeing the Support Office as well as an expansion of the role of

NGOs in co-operating with EASO's MB, which however were eventually both not granted requests. One final point raised by the EP's rapporteur Jean Lambert regarded possible future budgetary conflicts that might have risen with the establishment of EASO, given that the 2009 proposal of the Commission foresaw to finance the agency through funds that might have hampered other priorities set by the EP (European Parliament 2009, 26ff.). This seems to confirm the idea that once the EP had gained more powers with the entry into force of the Lisbon Treaty, it started adopting positions that were closer to those of the Council and to its own benefit.

Once EASO had been established, in 2011 the Commission tried with a communication on enhanced intra-EU solidarity in the field of asylum to translate 'solidarity' into concrete measures, as an essential component of the CEAS (COM(2011) 835 final). The Commission had thus already tried to advance an ambitious proposal to supranationalise the asylum policy further. Nevertheless, this proposal was rejected by the first intermediate principal, the Council, since such measures would have entailed an empowerment of the supranational agent, the Commission, over primary principals on cases of transfer.

With the outbreak of the Schengen crisis in 2015-16, the supranational agent stressed that changes in the existing CEAS were seriously needed. The related importance of EASO in developing and maintaining such a common system had already been acknowledged by the European Commission in its migration Agenda of 2015. Prior to presenting its proposal for a new EUAA in 2016, the European Commission had considered the positions of primary principals in the European Council as well as of the further intermediate principals, the Council and the Parliament. The European Commission intended to improve the overall CEAS by creating a fair system to determine which MS would be responsible for asylum seekers; reinforcing the Eurodac system; preventing secondary movements; and finally enhancing the mandate of EASO (COM (2016) 197 final).

With regard to the position of EASO itself, its executive core, i.e. the MB and its back then ED Mr. Carreira, had also during the crisis tried to push for a reform of the agency. In June 2018, however, Mr. Carreira had to step back from his position due to a scandal within his agency and accordingly announced his resignation, which was then accepted by a decision of EASO's MB. The obscure and tainted circumstances that led to such a resignation have not been clarified yet and in general, the scandal did not get much of the press' attention. The only information available was that Mr. Carreira had been under investigation for alleged

fraud, irregular recruitment procedures as well as cases of psychological harassment (Agence Europe 2018b; Barigazzi 2018). After the ED's resignation, an interim ED, Mr. Jamil Addou, who had previously served as the Head of Unit at EASO since 2016, was appointed immediately after. According to the interview information collected (and as outlined in subsection 5.1.3), ED Carreira had, especially during the outbreak of the crisis, overstepped his mandate. This was probably the inevitable consequence of an existing gap between EASO's limited mandate and its resources on one side and what the EU expected the Support Office to achieve in the face of the crisis on the other. According to an expert that had closely worked with the office, "sometimes" steps that otherwise would not have been allowed needed to be taken, in order to close the mentioned gap and deliver effective results, which could eventually lead to unexpected and unwanted consequences (Interview with EASO Expert 1 2018).

Without entering into the merits of Mr. Carreira's actions, this information suggests that EASO tried, during the Schengen crisis, to act autonomously and loose itself from the limits that its regulation foresaw. Relatedly, the explanatory memorandum to the 2016 Commission's proposal for a new EUAA stated that EASO "gained experience and earned credibility for its work" and that it should be acknowledged its role as a centre of expertise in its own right without still significantly relying, as done so far, on the information and expertise provided by MS (European Commission 2016f, 2). The envisaged fully-fledged agency would thus be able to monitor and assess the implementation of the CEAS, increase practical co-operation and information exchange among MS, support a 'fair' distribution of applications for international protection by operating the distribution key of the Dublin system, and assist MS in times of crisis also through its intervention on national territory.

### **5.2.3 The Decision-Making: A new European Union Agency for Asylum**

In the following, I analyse the third part of the theorised causal mechanism, i.e. the decisional steps undertaken by the intermediate principals in the decision-making process to adopt a regulation significantly empowering the Support Office.

The objective of first establishing and then improving common instruments for the effective implementation of the CEAS has always challenged the work of the EU. Given the more far-reaching national consequences that EU legislation in the asylum sub-policy has by touching upon core national administrative functions, supranational decision-making on asylum questions has often been hampered by primary principals trying to dominate migration control. The supranational co-operation achieved so far in the realm of asylum is hence the



result of extensive negotiations and hard-won compromises.

EU multiple agents can protect and promote higher standards in relation to the application of the CEAS, since they are not subject to electoral fluctuations and subsequent political pressure as are conversely majoritarian institutions on their national territory (Thielemann and Zaun 2018). Consequently, when decision-making rules in a specific policy realm are more supranational as a consequence of increasing communitarisation, the influence of multiple agents (as for instance the European Commission) is expected to be greater in the presence of a crisis.

The introduction of the ordinary legislative procedure in the asylum policy as well as the increasing role of EASO is expected to feedback on the EU multiple principals' decisions and the significant empowerment of the agency itself. Going back to my second proposition, I expect the presence of unanimous decision rules among the intermediate principals to allow the multiple agents to gain more power and push towards more supranational delegation. When looking at the AFSJ in general and the asylum policy area in particular, consensual and demanding supranational arrangements are in place. Ever since the signing of the Lisbon Treaty, the Council decides by QMV and no longer by unanimity vote alone, while the EP has become a co-legislator. Moreover, in asylum policy the Commission holds the monopoly when it comes to legislative initiatives and has accordingly enhanced its influence. This has allowed the Commission and the EP, especially in the second phase of the CEAS (2009-2013), to push more effectively for the legislative outputs they had envisaged.

Once the Schengen crisis broke out, the European Commission almost immediately took decisive steps on asylum related issues. In June 2015, the supranational agent requested all MS to resettle 20,000 people in need of international protection during the period between 2015 and 2017, as already announced in its Agenda on migration (European Commission 2015d, 4). Following this recommendation and in the light of the emergency situation calling for reinforced solidarity, the Council consequently stated a few weeks later that it was ready to establish a temporary and exceptional relocation mechanism over two years to support frontline MS (Council of the European Union 2015c).

The migration crisis of 2015-16 revealed existing weaknesses of a system that “collapsed under its own weight”, especially in the field of asylum (Menéndez 2016; quoted in Niemann and Zaun 2018, 4). The new agency for asylum envisaged by the Commission should therefore co-ordinate not only information among primary principals, but also improve the functioning of the CEAS, which has been always greatly challenged by an obsolete Dublin

system. Against the catastrophic experience of the Schengen crisis, the European Commission presented two legislative packages of proposals to reform the CEAS including the proposal for a EUAA. In April 2016, the Commission thus issued its communication on the reform of the CEAS and one month later in May 2016, the legislative proposal on a new EU Agency for Asylum (Council of the European Union 2016b; COM(2016) 271 final). The proposed regulation was thus officially presented together with other legislative proposals to further harmonise asylum standards and consequently the overall asylum policy. The *first* package of proposals carried out by the Commission was accordingly meant to reform the whole CEAS as such. The CEAS reform thus would include: (1) a reform of the Dublin system through the proposal of a new regulation (COM(2016) 270 final); (2) a proposal for the reinforcement of the EU fingerprint database for asylum seekers, Eurodac (COM(2016) 272 final) by amending its regulation of 2013 (European Parliament and Council of the European Union 2013b); as well as (3) the transformation of the Support Office into a fully-fledged EU agency for asylum.

In July 2016, the Commission then presented its *second* package of proposals to achieve a comprehensive reform of the existing CEAS, which included: (4) a proposal for a new regulation to replace the Asylum Procedures Directive (COM(2016) 467 final); (5) a proposal for a new regulation for the qualification of TCNs or stateless people as beneficiaries of international protection, which would replace the Qualification Directive of 2011 (COM(2016) 466 final); (6) a proposal to amend the Reception Conditions Directive (COM(2016) 465 final); (7) as well as a proposal for a Union Resettlement Framework (COM(2016) 468 final).

With regard to the content of the Dublin regulation, while the EP had suggested from the start an *overall* examination of the Dublin system, the Commission decided to propose an allocation mechanism that would be activated only when some of the EU MS were facing excessive numbers of asylum seekers (European Parliament 2017a). Hence, instead of updating the Dublin III regulation and adopting the proposed Dublin IV, a short-term solution was favoured. This solution has had major implications for the expected reform of EASO to become a new EUAA. The reform of the CEAS rests on the mentioned two legislative packages, which comprise in total the outlined seven texts. This huge package of proposals for new regulations and directives needs to be reformed and approved all together, without any exception in order to reinforce a common EU asylum policy (Interview with Frontex Expert 2 2018).

In order to swiftly tackle problems related to asylum proceedings on the ground, after presenting the European Agenda on Migration the European Commission had kept calling between 2015 and 2016 on its primary principals to honour their commitment and help people in need of international protection (as already outlined in sub-section 5.2.2.1). For the first time in the history of European migration policy, the European Commission used in 2015 the emergency response mechanism under Article 78(3) TFEU, in order to propose a *temporary* relocation scheme, the *first* of its kind.<sup>211</sup> In 2015, the EP had also called on the Commission to establish “a binding quota for the distribution of asylum seekers among all Member States” (European Parliament, 2015, Point 1, 8 and 9).

The Commission’s agenda setting powers have become stronger since the introduction of majoritarian rules in the Council, because any proposal of the Commission does not have to accommodate anymore all the MS and can instead set the course of legislation (Thielemann and Zaun 2018, 909ff.). The first temporary and then permanent resettlement schemes proposed by the European Commission in 2015 were, for instance, an initiative of the EU Executive to better distribute the sharing of responsibility among EU countries, whose majority regarded such a solution as sub-optimal. At the same time, the MEPs backed the proposal of the Commission, demonstrating that the EP and the Executive sought to bring forward their positions despite an unfavourable political context.

In order to support MS with weaker asylum systems, during the Schengen crisis the Council adopted two decisions in September 2015 on the relocation of people in need of international protection. Previously, in July 2015, the JHA ministers had consensually agreed on the distribution on a voluntary basis of 32,256 persons (which however corresponded to 20% less than the original goal of 40,000 set by the Commission).

While EASO’s intermediate principals, the EP and the Commission, sought to implement concrete solutions to achieve a fairer sharing of responsibility in the common asylum policy of the EU, primary principals continued to hinder such supranational solutions. Heads of state and government pursued a purely *voluntary* redistribution mechanism, thus hindering any progress in the face of the migration crisis (Agence Europe 2015e).

Simultaneously, the EP’s rapporteur Ska Keller stressed the MEPs’ support to the proposal of the European Commission to introduce compulsory resettlement schemes for refugees. Specifically, she stated that the EP “had to be a co-legislator and that its voice will

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<sup>211</sup> The legal basis for these decisions was Article 78(3) of the TFEU, which gives the Council the right to adopt provisional measures on a Commission’s proposal, in the event of one or more MS being confronted by an emergency situation characterised by a sudden inflow of TCNs.

be better heard on the permanent resettlement mechanism that the European Commission intends to propose at the end of the year” (Agence Europe 2018c). In September 2015, a wide majority of MEPs additionally passed a resolution that called for a compulsory mechanism to divide up asylum-seekers among countries and amend the Dublin system (Agence Europe 2015d). Similar schemes and proposals for a reform of the Dublin system had been already discussed by national delegations in 2012 (Council of the European Union 2012), but no concrete follow-up decision had been taken so far.

As mentioned above, in September 2015 the EU’s first intermediate principal, the Council, eventually followed with two decisions (Council of the European Union 2015d; 2015e), which approved of the relocation scheme applying to the agreed total of 40,000 persons in need of international protection that would arrive to Italy (24,000) and Greece (16,000) after 15 April 2015 (without foreseeing any retroactivity).

The first of these Council decisions on establishing provisional measures in the area of international protection for the benefit of Greece and Italy was adopted on 14 September 2015 and the second a week later, on 22 September 2015. This latter decision had the additional inclusion of an annex with the exact relocation numbers per MS (Council of the European Union 2016g). With this second decision, the Council sidestepped the opposition of the Visegrad group through a qualified majority vote. The Luxembourg presidency of the Council of the EU stated that it had been obliged to force the matter and move to a qualified majority vote, contrary to what it had hoped would be the case: “We would have preferred consensus; we tried, but some countries did not rally” (Agence Europe 2015g). Consensual decision-making on asylum related issues was not possible and the EU intermediate principals had to resort to alternative solutions to impose certain decisions on the recalcitrant primary principals. The final decision stipulated that no MS would be allowed to refuse its quota and simultaneously deleted any reference to the obligatory criteria and the distribution key (based on the country’s GDP, population, unemployment rate, and hosting efforts) set out by the Commission. This agreement between the intermediate principals on one side and primary principals on the other was a compromise which even Poland – one of the most critical countries towards the relocation mechanism – accepted, since the decision guaranteed specific safeguards, such as being temporarily delayed in exceptional situations (Agence Europe 2015g). According to a document issued by the Council of the European Union (2015), Hungary and Austria did however not accept the relocation of any person in the first place.

The two Council’s decisions of 2015 were followed in July 2016 by the European Commission’s proposal of a *permanent* resettlement scheme (European Commission 2016i).

Although in 2015 the Council had agreed to such a relocation scheme, in October 2016 primary principals had still not intensified their efforts to accelerate relocation and existing resettlement schemes (European Council 2016).

Against these dysfunctionalities and challenges, intermediate principals started negotiating on the EUAA proposal. In the face of the migration crisis and despite their diverging positions, primary principals had (at least on paper) recognised that the effective implementation of the CEAS was “an absolute priority, [...which] should go hand in hand with a reinforced role for the European Asylum Support Office (EASO)” (European Council 2014, 3ff.). The EU heads of state and government had thus acknowledged the essential step for the effective implementation of the CEAS, namely the reinforcement of the Support Office. However, although the premises for reforming the office into a fully-fledged agency seemed in the beginning encouraging for such a change to eventually happen, years have passed since the Commission presented its proposal for a new EUAA to the Council in May 2016, without any follow-up decision.

In its communication of April 2016 preceding the EUAA proposal, the European Commission had initially suggested to transform EASO “into an EU-level first-instance decision-making Agency, with national branches in each Member State”. The document further advocated that if the enhanced agency would assess that EU MS did not take action to guarantee common asylum standards, the Commission itself “could be empowered to prescribe, by implementing acts, operational measures to be taken by that Member State, taking into account recommendations from the Agency” (COM (2016) 197 final, 9 and 12).

In the proposal of 2016, the idea of the EUAA as a decision-making instance was dropped. The proposed text of the European Commission foresaw the delegation of more tasks to the agency (as outlined in sub-section 5.1.1) and the availability of more staff to carry out such tasks (COM (2016) 271 final, 72).

Before presenting its proposal, the European Commission had consulted the primary principals, who had acknowledged EASO’s “significant role” in assisting them with relocation and resettlement. Consequently, since the agency “gained significant knowledge and experience in the field of asylum” (ibid., 5), it would be time to transform it into a fully-fledged agency in its own right, so that it would no longer need to rely on the expertise provided by the EU MS. At the beginning of the explanatory memorandum of the 2016 proposal, the Commission further stressed that over time the tasks undertaken by EASO had progressively evolved “so as to meet the growing needs of Member States”, which “increasingly rely” on the agency’s work (ibid.). Chapter 6 of the 2016 proposal would

accordingly significantly expand “the role and functions of the Agency insofar as operational and technical assistance is concerned similarly to what was proposed by the Commission for the European Border and Coast Guard Agency” (ibid., 2 and 9). This is once again proof of the European Commission’s strategy to simultaneously improve both migration agencies and upgrade them to better functioning structures with an enhanced mandate. Moreover, the primary principals’ considerations on their growing dependence on the agency’s activity and provided information confirm that this factor mattered greatly for a possible reform of EASO to even get under way.

A detailed examination of the proposal to establish a new EUAA was started by the Council at the Asylum Working Party meeting in June 2016. Given the co-decision procedure, negotiations with the EP started immediately after in January 2017. Informal trilogues between EASO’s three intermediate principals as well as numerous technical meetings between the Council and the EP during this period suggest the intensified exchange of information especially between the ministers sitting in the Council and the EU MEPs. These numerous meetings and exchanges between the two intermediate principals would not have taken place before the COD was introduced.

Discussions within the Council on the future EUAA took place almost every month between 2016 and 2018. They were the result of numerous informal consultations with primary principals as well as the work of the Council’s preparatory bodies, as for instance the mentioned Asylum Working Party. During these meetings, numerous concerns were raised by national delegations, in particular with regard to the monitoring and assessment tasks envisaged for the new EUAA (Council of the European Union 2016i). Some countries (e.g. Romania) were afraid that this would lead to excesses from the new agency and overlaps with the Commission’s powers. Moreover, primary principals expected the new agency to lack the ability to properly assess the MS’ asylum and reception systems. The majority of MS stressed that they would accept a more limited monitoring role for the agency as, for instance, in the case of the vulnerability assessment laid down in the regulation establishing the EBCG. As in the EBCG’s case, primary principals agreed, once again, that in the case of a disproportionate pressure on the asylum or reception system of one of them, the measures to be taken by the EUAA should be adopted by a Council decision based on a Commission’s proposal, and not by a Commission’s implementing act (as conversely framed in Article 22(3) of the proposal for a new EUAA of 2016) (see also Council of the European Union 2016j).

Despite agreeing that a reform of EASO would be a necessary precondition for the correct

implementation of the CEAS, the primary principals represented in the Council were hence predominantly doubting the added value of an agency that would have far-reaching monitoring powers, an aspect that was, on the contrary, strongly supported by both the Commission and the EP, as the further intermediate principals to EASO (European Parliament 2016d). EU countries further expressed reservations on the proposed EUAA MB's competence to determine how many experts each MS should provide to the asylum reserve pool and preferred the option of an annex to the EUAA future regulation that would enlist pre-established numbers instead. The parallels with the discussions on the EBCG's regulation are here quite evident.

Although many reservations were thus raised on a strengthened EUAA, there were also some exceptions among the EU MS. Southern EU countries as Italy seemed to be generally in favour of reinforcing EASO and granting the Commission related decisional powers (Council of the European Union 2016c; 2016l).

By the end of 2016, a large majority of MS seemed to welcome the proposal to strengthen the role of EASO, but, as maintained in the documents issued by Coreper, they still expected additional clarifications on the EUAA's monitoring task (Council of the European Union 2016h). In December 2016, the JHA Council further announced that despite the majority of EU MS welcoming the reform of EASO, additional concerns had been raised about possible overlaps between the new EUAA's monitoring tasks and the Commission's competences (Council of the European Union 2016k). Hence, the Council's presidency redrafted relevant aspects of the proposal, since primary principals continued to express reservations on the proposed monitoring powers of the future agency.

At the same time, the EP adopted its report on the Commission's proposal (end of 2016), which was presented in May 2017 after a first (single) reading. In this document and following discussions, the EP attached "great importance" to the "considerably strengthened and more independent role" of the future EUAA, whereas during the first trilogue of February 2017 the Council conversely continued to emphasise the importance of the agency's subordinated role in assisting MS (Council of the European Union 2017a, 6).

The EP had not only introduced amendments regarding the agency's independence, by stating, for instance, that "the task of monitoring and evaluating the CEAS should not be carried out by seconded experts, but by the Agency's own staff, trained for that purpose" (European Parliament 2016d, 48). It had also presented various amendments on the protection of fundamental rights and emphasised that this new fully-fledged EU agency should have an

expanded mandate (including a higher number of capabilities) compared to the former Support Office, in order to guarantee the full implementation of the CEAS.<sup>212</sup> The EP thus backed the Commission’s proposal for a new EUAA, reiterating the importance of entitling the new agency to exercise control over EU MS about the implementation of the CEAS and to rely on the mentioned AIP, formed by no less than 500 experts contributed by primary principals (European Parliament 2016c). The presence of a set pool on which the agency would be able to rely echoes the EBCG’s rapid reserve pool. The EP simultaneously proposed also numerous amendments primarily related to a fairer distribution of responsibility among MS and a stronger protection of human rights (see also Schneider and Graff 2018).<sup>213</sup>

The most relevant addition introduced by the Parliament was the future agency’s task to visit *unannounced* the territory of a MS to monitor its implementation of the common asylum rules (European Parliament 2016d). Finally, the EP had further fostered that the new asylum agency would also have a FRO (as in the case of Frontex since 2011), who would be in charge of monitoring and ensuring respect for fundamental rights in all its activities. The FRO would also have to monitor the newly-created complaint mechanism.

Chapter 5 on the monitoring functions of the future agency for asylum is the most controversial issue of the new EUAA’s mandate. This appears to be the counterpart in the asylum policy of the highly discussed vulnerability assessment task of the EBCG. In order to reach consensus with the Council, the EP had to renounce to far-reaching amendments to the Commission’s proposal that it had presented in 2016. Accordingly, the asylum systems of the respective MS would not be monitored every three years as initially requested by the EP, but rather every five years. The EP was also in favour of “unannounced visits” by the agency in the MS under observation, which were however also replaced by the much softer concept of “short notice visits” (Presidency of the Council 2017, 3). In exchange for “broadly preserving the Council position on monitoring” and hence for the deleted amendments that the EP had originally suggested, the Council accepted the EP’s amendments related to fundamental rights. However, even these amendments needed to be significantly adapted to the primary

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<sup>212</sup> For more details on the procedure establishing EASO visit the European Parliament’s website available online under [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2009/0027\(COD\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2009/0027(COD)) (last accessed on 5.2.2019).

<sup>213</sup> For further details see the Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 available online under <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2016-0392&language=EN> (last accessed on 10.6.2019).



principals' positions (ibid., 5).

Given the diverging positions of the EU legislators on the proposal, in January 2017 the Council of the European Union under the Maltese presidency tried to give new momentum to the negotiations on the EUAA, by announcing that it wanted to push for a reform of the CEAS including the transformation of EASO. According to the intermediate principal, migration and asylum still represented pivotal priorities and the events unfolding at the Southern border of the EU during the migration crisis fuelled this position (Maltese Presidency of the Council of the European Union 2017). Nevertheless, a year later German Chancellor Angela Merkel expressed her doubts about reaching a consensus on a CEAS reform among EU MS after all (Agence Europe 2018a). These two positions exemplify the ever-present conundrum in questions regarding asylum integration. Some actors seek to advance the supranational dimension of the asylum policy, while the overall results in this direction remain rather sobering (see Ripoll Servent and Trauner 2015).

Nevertheless, the European Commission reported in 2018 that the informal trilogues between the intermediate principals of EASO, i.e. the Council, the EP and the Commission itself, had “significantly advanced” during the last two years (European Commission 2018b, 5). Between 2016 and 2018, EASO's primary and intermediate principals have been negotiating on a new EUAA that would be, similarly to its counterpart in the area of border control, a “centre of *expertise* in its own right and not one that still significantly relies on information and expertise provided by Member States” (COM(2016) 271 final, 2 [emphasis added]).

At the same time, however, the EU asylum policy remains a highly legalised sub-policy of the AFSJ characterised by a generalised reluctance of primary principals to transfer power to the EU despite the multiple agents' efforts to achieve the opposite. Moreover, over the years and especially during the Schengen crisis practical co-operation in the asylum policy field has increased on the ground to fill the gaps left by the EU legislators. EASO's development epitomises such an enhanced practical co-operation and the Commission seeks to catch up with this new reality by proposing the correlated legislation.

After five informal trilogues and several technical meetings, in June 2017 a provisional “broad” political agreement was reached within the Council and the EP on the draft regulation (Council of the European Union 2018a). This ‘wide’ political agreement with regard to the

proposal for a new EUAA<sup>214</sup> did however not translate in the adoption of the related regulation. The Commission reported in 2018 that “[c]ompromises have been found on virtually all issues” (European Commission 2018b, 5), which remains however a vague statement on the actual results reached, since negotiations were still in progress during 2018.

The presence of multiple principals, primary *and* intermediate, with different positions and agendas seems to have created a different deadlock situation than the one hypothesised in the first part of the causal mechanism as a direct consequence of the Schengen crisis.

Against this prolonged impasse, on 12 September 2018 the Commission eventually presented in Salzburg an *amended* proposal for a regulation establishing the EUAA. The focus of this new proposal lies on the respect of fundamental rights as envisioned by the EP and on the enhanced operational tasks of the future agency, which would also be able to deploy liaison officers to MS in case of a disproportionate pressure on their asylum systems. Simultaneously, the Commission visualised a stronger role of the EP and a tightened reporting mechanism from the agency to its three intermediate principals.

Despite the concerns expressed by primary principals, the European Commission kept the monitoring task of the future EUAA also in its amended proposal of 2018. In this specific case, the EU Executive does not seem to have followed the usual strategy, i.e. trying to adapt its position to the primary principals’ and consequently to the Council’s request.

Although the European Commission submitted a second amended proposal in September 2018, no decision followed to establish a EUAA and the Support Office is not a fully-fledged agency yet. Furthermore, at the end of 2018 no compromise was achieved either on the legislative package to reform the overall CEAS. Although according to the European Commission’s press release at the end of 2018 (European Commission 2018f), “significant progress has been made overall” on the EU’s asylum reform, EASO has not been significantly empowered. The analysis showed that asylum issues are still highly political and extremely sensitive. Therefore, considerable hurdles still exist to a significant empowerment of the asylum office, which seem to be primarily related to the primary principals’ divergence on the overall CEAS’ reform.

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<sup>214</sup> The intermediate principals reached a wide agreement also on the amendment of the Eurodac regulation, which would allow Eurodac to have access to the national police authorities’ databases (European Commission 2018f).

### 5.3 Interim Conclusion

The evidence collected demonstrated that EASO experienced an increase in its budgetary and personnel resources over the years and that it exercised through its activities a wide influence on asylum decision makers in Southern European countries (e.g. Greece). EASO's accordingly growing role and resources within the broader CEAS initially suggested an overall reinforcement, in terms of an alleged empowerment, of the Support Office. However, when taking a closer look these increases are not enough to infer neither a mere empowerment of the agency nor a *significant* agency empowerment in the sense of this research. After EASO took on responsibilities in 2011, its tasks and issue scope have not substantially changed and although the European Commission presented in 2016 its proposal to develop the Support Office into an agency, which would facilitate implementation and improve EASO's current mandate, at the end of 2018 EU intermediate principals had not yet adopted the envisaged EUAA regulation.

The research question addressed in this chapter was whether (and if so, how) the Schengen crisis triggered a significant agency empowerment in the asylum sub-policy. According to the information gathered, the new mandate envisaged in the Commission's proposal of May 2016 is the result of three main root causes. First, the Schengen crisis and the consequent primary principals' acknowledgement of the necessity of a CEAS reform (EASO Expert 1 mentioned in particular Greece, Italy and Sweden), since after the migration crisis of 2015-16, an enhanced mandate for EASO appeared as an unavoidable evolution for this body, "a necessary institutional step on the way to greater 'Europeanisation'" (Schneider and Graff 2018, 7). Second, a collapsed EU Dublin system and third, power players such as EASO's ED, who partially further determined the growing role of the agency, are additional root causes. If at the beginning there were neither capacities nor the primary principals' will to support a strong asylum Support Office, the new EU scenario after the Schengen crisis changed these premises. Nevertheless, the hypothesised trigger did not lead to the expected outcome, namely the significant empowerment of EASO into a new EUAA.

Although especially in the aftermath of the Schengen crisis, the budget and personnel resources of EASO have constantly grown accompanied by some internal structural transformations, these changes cannot be defined as 'significant' and no reform transforming EASO into a fully-fledged EUAA took place.

In the light of the information collected for EASO's case study, the first advanced proposition on the diverging primary principals' positions resulting in a deadlock situation is

confirmed by the data. EU MS were and are still not able to agree on key asylum matters. In the face of the consequent political impasse triggered by the migration crisis of 2015-16, the European Commission, in its double role of intermediate principal and supranational agent, advanced its proposal for an enhanced asylum agency backed up by the further intermediate principal, the EP. During negotiations on the EUAA proposal, the Parliament had advocated an even more comprehensive expansion of EASO's mandate, which however did not receive the necessary support by the reluctant members sitting in the Council.

Going back to my two other propositions, according to which I expect unanimous decision rules among intermediate principals and the sharing of competences between the national and the supranational level to determine a significant agency empowerment, the analysis shows two paradoxes. First, although a *wide* political agreement was reached among the agency's intermediate principals, i.e. the Council and the EP, the regulation for a new EUAA was not adopted. While at the beginning of the negotiation phase (in 2016), the EP seemed to push for a comprehensive reform of the CEAS including a reinforcement of the Support Office, it eventually had to agree to the requests of the Council in order to reach consensus on the EUAA proposal. Second, although primary principals acknowledged the importance of reforming the CEAS and also the related significant role of EASO in a policy area of shared competence, the multiple agents were not able to achieve a significant agency empowerment in the asylum sub-policy. Despite the emergency crisis in 2015-16, primary principals' did not have to increasingly rely on the agency's activity, with the exception of Greece and Italy (i.e. the frontline MS). Notwithstanding EASO's key characteristic, namely its being a unique centre of asylum expertise, the expected significant empowerment of the Support Office has thus not taken place and EASO seems to be lost in transition. The main obstacles to EASO's reform lie in the proposed reforms of the CEAS and the Dublin system, on which primary principals need to agree first, before approving the enhancement of the agency acting in the corresponding policy. Hence, intermediate principals have to first adopt reforms that enhance the overall integration in the asylum realm, before being able to move to the reform of specific institutional bodies.

During these discussions on a new EUAA, the EP position was, according to my analysis, very close to the position of the Commission. This represents an important change in the asylum policy, since in the past, the position of the supranational agent was closer to the position of the Council and usually diverging from the position of the EP (cf. Ripoll Servent and Trauner 2015). Given the presence of strong diverging positions between the primary principals as well as between primary principals and intermediate principals, the decision-

making process has reached a stalemate. Despite EASO's growing presence on the ground (especially in the hotspot areas), the analysis showed that besides not being able to adopt the proposed EUAA regulation, the co-legislators encountered major difficulties in reaching an agreement on the core of the CEAS reform, namely the proposal for the so-called Dublin IV regulation and the proposal for an asylum procedures regulation. In mid-2018 a formal ratification of the EUAA regulation was still expected, not because the Council and the EP were not able to reach a compromise on this proposal, but because they were not able to do so on the 'package solution' to reform the CEAS (Schneider and Graff 2018, 3).<sup>215</sup> The European Commission had a leading role in the establishment and future enhancement of EASO, but it was not able, as expected in the fourth part of the theorised causal mechanism, to achieve the adoption of a regulation significantly empowering the Support Office.

In September 2018, MS were still failing to agree on the so-called 'asylum' package that the European Commission had proposed in May 2016, including the proposal for a new EUAA. Simultaneously, the EU Executive presented a second proposal for the establishment of the EUAA amending the 2016 proposal (COM(2018) 633 final). The new proposal envisages (as outlined in sub-section 5.2.3) a EUAA that would be able to offer strengthened operational and technical assistance to MS, including the possibility to help them in executing the administrative phase of the asylum procedure. The new agency would thus offer administrative support for all parts of the procedure: for international protection to TCNs as well as for the Dublin process (Agence Europe 2018d). It would also support MS in the identification and registration of asylum seekers and, eventually, under the new Dublin regulation that currently needs to be still adopted as well, assist in determining the MS responsible for the examination of a specific asylum application and co-ordinate the transfer of asylum seekers within the EU.

In sum, the announced reform of 2016, which should have transformed EASO into a fully-fledged agency for asylum, seems primarily to be hindered by the cemented Dublin structures, which are no longer suitable in the current EU landscape (and maybe have never been), and the failed reform of the CEAS. The analysis presented in this chapter has shown that not only has no significant agency empowerment occurred so far in the case of EASO, but also that besides some medium increases in the long term in terms of the agency's budget and staff, nothing has changed either (*de jure*) with regard to EASO's tasks and issue scope.

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<sup>215</sup> As maintained by Schneider and Graff (2018, 2), "if there is no outcome from the conciliation procedure in 2018, the proposed CEAS reform may fail entirely".

## Chapter 6: Conclusion

The dissertation focused on the complex institutional relations underlying the EU migration policy by addressing the overarching research question whether the Schengen crisis triggered a significant empowerment of migration agencies and how exactly such significant agency empowerment occurred in the sub-policies of border control and asylum. Whereas after the Schengen crisis of 2015-16 the agency Frontex experienced significant empowerment, EASO did not, although the border control and asylum sub-policies should advance in parallel to achieve more integration and a common approach to migration in the EU. Reforms were thus – and continue to be – undertaken with regard to border control only, while renovation in the asylum policy yet lags behind, although urgently needed.

In this study, I claimed that only under specific scope conditions the Schengen crisis caused a significant agency empowerment and that the agency's intermediate principal and one of the EU's multiple agents, the European Commission, was crucial to reach such outcome. Furthermore, I assumed that the 2015-16 crisis created the same premises in both sub-policies, i.e. diverging positions among the primary principals in a policy area of shared competence as well as multiple agents (the agency in question and the Commission) pushing (indirectly and directly) for reform through a new regulation proposal. Nevertheless, due to the different institutional and temporal conditions under which the agencies act, the crisis triggered a series of institutional steps that led to the significant empowerment in the case of Frontex, but not of EASO. By testing the same theorised causal mechanism and its four main parts in both Frontex's and EASO's case, I observed that the migration crisis triggered two different mechanisms in reality given the different degree of integration reached within each sub-policy respectively. Although the method deployed does not allow to infer the overall and general effect of the specific cause in question, namely the Schengen crisis, it nonetheless enables to show how that cause triggered different mechanisms in two different contexts given specific independent variables (i.e. the principals' positions as well as the decision rules among them) and scope conditions.

The following sections summarise the main findings of the two case studies to then present some alternative explanations to the P-A theoretical approach for the changes experienced by both Frontex and EASO after the Schengen crisis. Finally, possible avenues for future research are suggested.

## 6.1 Main Findings

The premise for a common EU migration policy is the simultaneous advancing of its main sub-policies. Accordingly, the mandates of the two migration agencies involved in the border control and asylum sub-policies should progress at the same pace, given moreover that both Frontex and EASO work closely together on the ground (e.g. in the hotspots). The analysis carried out in this dissertation shows that this overall EU objective did not pass the reality test: whereas after the Schengen crisis Frontex was given a stronger mandate becoming in 2016 the reinforced EBCG and thus experiencing a significant empowerment with the prospect of further strengthening, EASO is still a fledging agency that has not been significantly empowered into the planned new EUAA. The rapid supranationalisation process in the border control area testified by the increasing delegation of power to Frontex will remain ineffective in preventing future crises, if the EBCG's continuous upgrade is not accompanied by corresponding extensive reforms in the asylum sub-policy.

The reform of the EBCG was approved of and implemented within only nine months after the Commission's proposal of December 2015, whilst a political agreement on the overall reform of the CEAS and a related adoption of the EUAA proposal were yet expected in June 2018 after two years of discussions (European Commission 2017f). These diverging processes confirm that the mandates of the two migration agencies are not developing conjointly, despite the common approach to migration envisaged in the Treaties of the EU.

The future of the Support Office and Frontex are closely intertwined. Answering the question of which sources and mechanisms explain a significant agency empowerment in the EU migration policy allows to grasp the broader lessons to be learned from the migration crisis and to understand how change takes place in EU migration governance. Over the years, both Frontex and EASO, although initially established as agencies with mere administrative powers, have expanded their *de facto* role and strengthened their operational activities. In the border control policy, given the increasing number of operational interventions and resources expanding the border agency's work, the Schengen crisis worked as a specific external event triggering a series of actions initiated by all EU multiple (primary and intermediate) principals, but first and foremost by the European Commission. These actions within specific scope conditions ultimately resulted in the replacement of the old border agency with the strengthened EBCG. The same crisis disclosed the CEAS' weaknesses, which the European Commission planned to solve through a legislative package including a reform proposal for a new asylum agency that has however not been adopted by the EU legislators.

When the migration crisis broke out primary principals' positions diverged on how to

solve the emergency in a co-ordinated way with regard to both border control and asylum matters, as expected in the first part of the theorised causal mechanism. Primary principals' positions specifically diverged along the North-South and East-West cleavage, thus making the achievement of supranational solutions such as the enhancement of co-operation or a fairer responsibility-sharing *at* and *behind* the border challenging. With regard to border control, some primary principals resorted to national solutions rather than supranational ones by reintroducing controls at their internal borders (e.g. Austria and Germany), whereas in the area of asylum they disagreed on solutions of relocation and resettlement. In both cases, the European Commission, as part of the EU multiple agents, subsequently pushed (directly) for a reinforcement of EU agencies supported by the EU migrations' agencies own (indirect) requests for an enhancement of their mandates. The Commission thus profited from the impasse created by the diverging primary principals' positions to propose a significant empowerment of each agency in the relative policy and overcome the stagnation reached in the face of the crisis, as expected in the second part of the theorised mechanism.

In both cases, the European Commission acted as a supranational agent to its principals (i.e. MS, the Council and the EP) *and* as an intermediate principal to migration agencies, trying to safeguard the primary principals' positions while simultaneously pursuing the strengthening of both Frontex and EASO to transform them in more than just co-ordinating bodies. The double role of the Commission being both an agent to the EU legislators and the MS as well as a principal to Frontex and EASO is pivotal to understand the complex decision-making in EU migration governance. When in policies as the ones regarding border control and asylum the competences are shared between the MS and the EU, leading to a cumbersome reality, the analysis of the decision-making process requires particular care. The goal was thus to further disentangle the multiple and overlapping roles between principals and agents in EU migration governance to understand *who* decided *what* with regard to Frontex's and EASO's envisaged reforms.

According to the second and third part of the theorised mechanism, I maintain that the role of the intermediate principals at the EU level is essential for significant agency empowerment to occur. Analysing the decision-making among the EU legislators as further intermediate principals of the EU agencies *and* the Commission revealed that power politics between primary principals, i.e. the MS, are not the only driver ultimately leading to a significant agency empowerment. The strategy of the EU multiple principals and agents plays an important role as well, along with the primary principals' doing.

The further implication of such claims is that the agencies' changing institutional design



results from the principals' positions, but is, at the same time, also their partial driver, since each agency influenced such positions through its intensifying activity over the years. The growing experience gained by Frontex over time and its increasing operations on the ground affected how the agency was perceived by its primary (and intermediate) principals in the specific context of border control. Frontex's information-gathering and assistance-related tasks have become essential tools which MS *and* EU institutions as the European Commission can no longer do without. In the case of EASO, although the agency intensified its activity during the crisis (especially in the Greek and Italian hotspots) and accordingly experienced an increase in its resources, the Support Office's establishing mandate was far too weak to allow it to stand out in the eyes of the primary principals. The tasks, resources and scope of EASO are far more limited even than the ones of the former Frontex and only a circumscribed number of MS (e.g. Greece) highly depended on the agency's support during (and after) the Schengen crisis.

The migration crisis of 2015-16 uncovered the weaknesses of an asymmetric system of sub-policies and rules falling under the common migration policy and touching upon the core of the Schengen area. In the case of the asylum sub-policy, the crisis revealed the inadequate capabilities of EU primary principals to face the challenges posed by growing illegal migration flows as well as the limits of an already deficient Dublin system. Especially those EU countries whose reception and asylum systems were most affected (Greece and Italy) had to consequently rely on those European bodies offering support in migration related matters (e.g. through the co-operation at the hotspots). The migratory pressures of 2015-16 thus led to a situation in which primary principals were not able to take swift action, while EU migration agencies expanded their activities as well as *de facto* powers on the ground, in order to close the gap between an inadequate supranational system falling short and the containment of an unmanageable reality. The discrepancy between primary principals going back to national solutions undermining the very principles of the Schengen system and the growing need for European co-operation created the political impasse that allowed the supranational agent, the European Commission, to push for a *significant* agency empowerment. The old dictum 'the Commission proposes the Council disposes' is still true, but more nuanced and complex when examining the EU reality including agencies, since additional actors are involved in the contemporary decision-making process. While drafting the border agency's and Support Office's mandate, the Commission had a wide range of action, although it followed the instructions of both the Council and the EP (as well as guidelines of the primary principals).

The principals deciding upon the EBCG's far-reaching mandate and the reform of EASO into a novel EUAA were thus not only the primary principals' representatives sitting in the Council, but also the European Commission and the EP, two institutions whose powers have grown over the years, especially since the Lisbon Treaty. Within this changed institutional landscape, classic P-A concepts can help to understand the complex web of actors and their respective functions if these concepts are adapted accordingly. In this regard, the European Commission's sole right of legislative initiative as well as the COD, which ensures that the EP is a co-legislator on an equal footing with the Council, have been essential changes in the institutional history of the EU. In the light of this procedure, the dissertation's nuanced definition of 'principals' allowed to distinguish between the different sets of principals, i.e. *primary* and *intermediate*, and to demonstrate how the EU system resembles a system of Chinese boxes, where the relations between national and supranational actors have become in P-A terms increasingly intricate.

In the light of my analysis, it would be erroneous to consider the MS or the Council as the only (primary) principals (or 'collective principal') of EU migration agencies. By defining a principal as any actor participating in the process of delegating authority to an agent and exercising control over the latter, the empirical analysis of this dissertation identified, besides the MS and the Council, the European Commission and the EP as pivotal in determining the legislative process through which powers are delegated to migration agencies. The analysis of Frontex's and EASO's distinct developments showed the key role that the European Commission had in shaping their mandates. The Council and the EP are officially the principals (intermediate ones, according to the terminology used in this dissertation), but they can only act upon a proposal of their supranational agent, that is the Commission. The European Commission can also, in specific cases, adopt executive measures that the primary principals, the EU MS, have then to implement.

As for the EP, the further intermediate principal of EU agencies besides the Council and the Commission, MEPs had supported the idea of an enhanced mandate of both agencies. Nevertheless, in the case of the border agency when the Commission presented its 2015 proposal, the EP (specifically its LIBE Committee) raised numerous concerns regarding the 'shared' responsibility between the future border agency and MS. Once again, MEPs were worried about the impact of Frontex's activity on fundamental human rights and accordingly wanted to ensure more reporting duties not only from the agency, but also from the MS involved in its operations. Ever since the Lisbon Treaty, the EP has full veto powers in the decision-making process and has accordingly claimed its ownership of policy-priority setting.

During the debate on Frontex's reform, the EP used the opportunity to seize more power over the border control agency and, by extension, over the primary principals co-operating with Frontex. Eventually, the EP approved of the European Commission's objective to achieve 'more Europe' by enhancing supranational co-operation through a strengthened Frontex. The emergence of the EP as a strong player in the decision-making process was a necessary (although not alone sufficient) condition for Frontex's significant empowerment and the related approval of the EBCG's 2016 regulation to occur.

In the case of EASO, however, the stronger positions championed by the EP – which supported the Commission's proposal for a strengthened EUAA, especially its envisaged enhanced monitoring powers in order to guarantee a standardised system of protection for asylum seekers – changed in the course of the discussions on the EUAA proposal. Although the EP subsequently renounced its requests for a stronger EUAA moving its position closer to that of the Council, in 2018 the Support Office's reform was not yet approved. During these negotiations in the aftermath of the Schengen crisis, MEPs had initially aimed at transforming not only the agency, but also the overall framework it acts in, namely the CEAS, through the approval of an overall legislative 'package solution'. The primary principals' reservations toward a relocation system in the EU, the shortcomings EASO had to face when trying to deploy experts during the crisis and its reduced scale of operations reveal that the asylum policy sector has not undergone as fast and deep a reform as the related policy area of border management and its agency Frontex (European Parliament 2017b).

Over time, both the border control and asylum sub-policies witnessed increasing competences being delegated from the national to the supranational level. Consequently, more supranational co-operation has taken place through the growing activities of Frontex and EASO. The sharing of these competences between primary principals, intermediate principals and multiple agents in the EU also determined the growing role of the agencies as 'centres of expertise' in their own right. An increasing number of experts and carried out operations thus fuelled Frontex's and EASO's reform plans.

In September 2018, the Commission tried to give (again) new momentum to migration agencies. It did so by presenting one proposal to strengthen further the EBCG's mandate (but also to extend its own executive powers, for instance in emergency situations requiring urgent action) (COM(2018) 631 final) as well as an amended proposal for the creation of the EUAA (COM(2018) 633 final). Currently, the EBCG is allowed to require primary principals to take timely corrective action and to intervene on its 'own initiative' in cases where there is a disproportionate challenge at the external borders. Although such a right to take action

upholds national sovereignty, it might entail enormous consequences in terms of the agency's range of action. The most relevant implication is that, if a country refuses to co-operate, the EBCG can intervene based on a proposal of the Commission and by a qualified majority within the Council of the remaining MS in the Schengen area. The consent of the country actually concerned is not required.

The migration crisis could have represented a window of opportunity for political leaders to reform a CEAS and Dublin system that were falling apart. However, this opportunity seems not to have been seized and no major reform took place so far. Despite the numerous attempts of the multiple agents and the amended proposal presented by the European Commission in September 2018, the intermediate principals were not able to reach a common solution and accordingly failed in significantly empowering EASO.

In sum, the evidence collected revealed that on the one side, intermediate principals, especially the European Commission backed up by the EP, tried to push for significant agency empowerment along with decisive harmonised action in migration related matters by setting specific priorities to respond to the Schengen crisis (as in the 2015 European Agenda on Migration). On the other side, primary principals continued to defend their national positions and to decide independently to which extent they wanted to co-operate. The continuous requests of the multiple agents, i.e. the Commission and migration agencies, for more support within the EU system were thus coupled with the recalcitrant behaviour of (some) primary principals to step up their commitment. In the end, multiple agents succeeded in achieving significant agency empowerment in the area of border control but not in the area of asylum, because of the different scope conditions present in the two cases. Despite both border control and asylum policies being areas of shared competence, the analysis showed that the level of integration and supranational co-operation in the area of border control was higher than in the area of asylum and consequently, primary principals were more dependent on the assistance offered by Frontex rather than on the support offered by EASO.

In this study, I maintain that classic P-A theoretical concepts and assumptions can still be, if reinterpreted in the light of institutional change, a suitable tool to understand the intricate web of institutions in EU migration governance. Specifically, the analysis traced how in the common migration policy the decision-making processes, in which multiple EU principals and agents are involved, can lead to significant agency empowerment. The occurrence of a specific crisis as well as the peculiar relations and overlaps between the principals and agents in question ultimately determine whether significant empowerment occurs or not.

## 6.2 Alternative Explanations

This section presents possible alternative explanations and answers to the overarching research question addressed throughout the dissertation. Instead of deploying a P-A approach, the next two sub-sections engage with historical institutionalism and (neofunctionalist) integration theory. By drawing on these two theories, I seek to move the research agenda forward and provide different answers to the development of Frontex and EASO, highlighting the benefits of using different theoretical approaches.

### 6.2.1 Historical Institutionalism

An historical institutionalist approach allows to identify a specific point in time, a ‘critical juncture’, which determined institutional change through subsequent events unfolding over time. The critical juncture is thus supposed to “trigger” a ‘path dependent’, ‘self-reproducing’ process (Capoccia and Kelemen 2007, 348). The benefit of deploying such an approach lies in the focus it lays on the historical development of institutions and on the *causal* logic behind specific events. Compared to the P-A theoretical approach, historical institutionalism offers more clarity on the “key decisions (and key events in influencing those decisions) steering the system in one or another direction” (ibid., 369). Although there are some overlaps with the process-tracing method applied in this dissertation (such as the identification of a specific cause *triggering* a series of events and the explanation of the ‘causal mechanism’ behind it), the added value of an historical institutionalist approach is that it allows to distinguish between ‘transformational change’ and ‘incremental process’. The latter concept entails that small events, such as the creation of an agency with mere implementing tasks, can have unintended and not foreseen consequences by reinforcing an existing institutional equilibrium over time (e.g. the reinforcement of the agency itself). Hence, according to assumptions of historical institutionalists, a path-dependent institutional innovation is triggered by a specific critical juncture, which is a *brief* episode characterised by heightened contingency and by the high probability “that agents’ choices will affect the outcomes of interest” (ibid., 348). Junctures are *critical*, because “they place institutional arrangements on paths or trajectories, which are then very difficult to alter” (Pierson 2004, 135), thus determining a *path-dependent* process. Historical institutionalist theory postulates after each critical juncture a relatively long period of path-dependent institutional stability and reproduction, a crucial causal mechanism constraining future outcomes (see Capoccia and Kelemen 2007). In sum, the critical juncture can grow out of a fundamental societal or political cleavage, as for instance the Schengen crisis, and represent a major episode of institutional innovation generating an

enduring legacy (e.g. the significant empowerment of an agency) (Collier and Munck 2017, 3; cf. Neal 2009). Historical institutionalism is thus all about the identification of time sequences possibly leading to change and stemming from a specific critical juncture.

If researchers were to deploy historical institutionalism as a theoretical framework to explain the evolution of migration agencies, they would thus start by identifying one major critical juncture.

In the case of Frontex, the historical institutionalist approach allows to move the focus back in time to identify the critical juncture from which the establishment and subsequent development of the border agency emerged, i.e. the 9/11 terrorist attacks and the consequent growing security concerns among EU MS. The terrorist attacks of 2001 would represent an ‘exogenous shock’ during which the European Commission, as a ‘policy entrepreneur’ (Kaunert and Léonard 2012a, 421; Kostadinova 2013, 266) and a policymaker, took advantage of the peculiar conditions created by that shock and proposed the establishment of a border agency. Since any critical juncture coincides with decision-making under conditions of uncertainty (Capoccia and Kelemen 2007, 354), during the time following the attacks institutional innovation would be more likely to occur because of the fluidity and uncertainty of the moment. After a critical juncture, the agent (e.g. the Commission) ‘profits’ from uncertainty and security concerns producing an institutional change. Once the EU agency was created as part of the EU executive, this new body could in turn profit from future moments of insecurity by strengthening its influence and mandate. Hence, in the face of a new ‘crisis’ such as the 2015-16 Schengen crisis, the agency now in place might adopt ‘proactive strategies’ to further safeguard its power (cf. Capoccia 2016).

Following historical institutionalists’ assumptions, the path-dependent agency ‘empowerment’ would thus be the mechanism between crisis and outcome of interest, namely the heightened agency’s transformation eventually occurring through an official reform and resulting in a ‘significant empowerment’. Despite conceptual overlaps, the theory-testing process-tracing method would still be an option in combination with historical institutionalism. It would allow the researcher to trace the mechanism leading from X to Y by observing ‘whether the expected case-specific implications of its existence are present in a case’ (Beach and Pedersen 2013, 15). Increased security concerns due to frequent exogenous shocks in time, such as the migration crisis of 2015-16, would thus reinforce a continuous agency empowerment. The final observed outcome of a significant agency empowerment could further be regarded, in historical institutionalist terms, as a possible *unintended consequence*, since MS did not expect that Frontex’s mandate would expand into an EBCG

with a right to intervene in a EU country's territory, without that country's approval in case of an urgent situation at the EU common borders.

In the second case of EASO, the deployment of an historical institutionalism approach would most likely lead the researcher to identify the critical juncture triggering the creation of the Support Office with the Arab Spring and concomitant civil war in Libya of 2010 and 2011 respectively (although negotiations on creating the Support Office started before the occurrence of these events). The establishment of this new institutional body implied that MS were no longer able to act on their own and that the *status quo* needed to be changed through the supranationalisation of asylum procedures. Given the ever-present reluctance of EU countries to delegate powers to the EU in sensitive issue areas as the one on asylum, the subsequent proposal for a reform of the Support Office into a new EUAA years later seems to be the result of an *unintended consequence*. When negotiating the Support Office's mandate in 2010, MS had not agreed on an 'agency' as their preferred institutional structure, but on "the creation of a lightweight structure, devoted to supporting Member States, allowing the practical co-operation on asylum to improve" (Comte 2010, 379). Hence, this 'lightweight structure' should not have had any say or influence on the decision-making regarding asylum matters, which should have remained an intergovernmental responsibility. The Support Office should accordingly only represent a centre of expertise, of which MS could dispose as they pleased.

Whereas in the case of Frontex since the very beginning of the negotiations on the establishment of the border agency, the Commission had already envisaged a 'European border police', the proposed transformation of EASO into a fully-fledged agency was rather unexpected and initially unwelcome. The new agency would have far-reaching powers that could *inter alia* allow it to make unannounced visits on the territory of the EU MS concerned without prior notification, in order to monitor and assess the implementation of the CEAS (European Parliament 2016d, 47). The fact that the draft regulation for a EUAA has not been adopted yet by the Council and the EP, is the legacy of an ill-working and unsuited EU asylum system. Compared to the P-A approach, historical institutionalism allows to better trace these inconsistencies in the historical development of a common asylum policy and expand the temporal dimension of the analysis by adopting a 'macrohistorical' approach. This approach consequently looks not only at the events unfolding *during* and *after* the critical juncture, but also *before* it.

At the same time, although historical institutionalism can prove useful to shed light on the

broader dynamics underlying the evolution of migration agencies, it lacks fine-tuning and a more detailed analysis of the actors at work. Historical institutionalism can represent an interesting tool to look at specific sequences over time, but it is “devoid of a theory of agency – it has nothing to say about who the actors are, what their interests are [...], and how they go about pursuing them.” (Büthe 2010, 6). Through an historical institutionalist approach the researcher can gain interesting insights into the interlocking and systematic chain of events, identifying the main characteristics of specific periods in time and how they subsequently impacted on the ultimate outcome of interest. Nevertheless, its temporal focus *black-boxes* the institutional relations between the various players of EU governance and misses thus to exhaustively explore specific delegation processes.

On a more general note, despite the fact that some authors offered an interesting combination of institutionalist theories deployed as “conceptual lenses for drawing attention to different aspects of agency establishment” (Ekelund 2014, 102), institutionalist assumptions are not adequate to grasp the complex delegation procedures at the EU level. As shown in Chapter 4 and 5, the EU is a compound machinery, within which numerous actors engage and function together. Conversely to an institutionalist approach, the P-A model allows to identify relevant events and actors’ “fixed set of preferences” (Hall and Taylor 1996) as well as their roles and interplay within a specific policy context.

### **6.2.2 European Integration Theories**

This section turns to European integration theories and specifically to the neofunctionalist approach as an alternative explanation of significant agency empowerment after the Schengen crisis. Conversely to a P-A approach, neofunctionalists perceive European integration as a process primarily set in motion through a ‘spill-over effect’ and not in terms of delegation relations between the national and the supranational level. The ‘spill-over’ concept builds on a functional logic, implying that the integration of a specific sector (e.g. the border control sector) leads to sub-optimal results if integration is not extended to neighbouring policy areas (e.g. the asylum sector). Neofunctionalist theorists further generally argue that sectoral integration produces unplanned consequences of promoting integration in further issue areas (for an overview on EU integration theories see Pollack 2015).

In the case of the EBCG, Niemann and Speyer (2018) have already advanced a neofunctionalist argument to explain the transformation of the border agency into the EBCG. Although the neofunctionalist argument appears convincing in the case of the EBCG as briefly outlined in the following, it shows its limitations when trying to explain the failed



proposed reform of EASO.

The logic of neofunctionalism would explain a major case of “‘European refugee crisis’ policy-making” (ibid., 23), namely the establishment of the EBCG, by focusing on how ‘socialization’ and learning processes through continuous meetings as well as information exchange can facilitate consensus during negotiations within the Council. The “European refugee crisis” was the “result of existing dysfunctionalities, mainly between a supranational Schengen, and a weak external border regime in the hands of the Member States” (ibid., 38). These dysfunctionalities acted as a catalyst of further integration. Accordingly, the endogenous clash between a supranational Schengen and an intergovernmental border control regime ultimately determined further transfer of authority in the policy area of border protection, following the ‘spill-over’ logic and leading to the launch of the EBCG.

Niemann and Speyer’s study (2018) stands out for its systematic exploration of the subject and original argument, but the puzzle persists about why the two policy sectors of border control and asylum, which are two sides of the same coin, that is the EU migration policy, show disparities in their development. The weak CEAS and the failed launch of a EUAA represent the poor integration results achieved in the asylum policy, although a neofunctionalist logic would expect that the discrepancy between a supranationalised Schengen system as well as a strongly integrated border control policy on one side and a weakly integrated asylum regime on the other should be solved by moving supranational integration in the latter realm further.

Although the neofunctionalist logic allows to draw more links between the Schengen regime and the related integration of migration policy, it is not able to explain the two EU migration agencies’ different developments and the differing degrees of integration in their respective sub-policies. In the past, scholars have addressed this neofunctionalist theoretical challenge by investigating the different evolution undergone by internal and external security in the EU (Börzel 2005). Whereas internal security, which fell back then under the JHA domain, had been supranationalised and subsequently brought under the first pillar, external security – i.e. the common foreign and security policy as well as the European defence policy – was still confined to the intergovernmentalist realm. Whereas the JHA had been continuously supranationalised, the related CFSP and the European defence policy, both entailing national security interests, were still characterised by strong intergovernmentalism. The academic challenge that this gap represented to European integrationists was then solved by distinguishing between the European integration’s *level* – i.e. how competences are transferred from the national to the supranational level – and the *scope* – that is the procedures

according to which policy decisions are taken at the European level. This distinction would allow to identify the specific nuances of the EU system and to address the question *why* Frontex was significantly empowered and EASO was not. In line with the theoretical distinction between ‘level’ and ‘scope’, when looking at the specific case of the common migration policy two points need to be made. Although the *acquis communautaire* has been fully integrated and the EU has been accordingly able to create a common market, political integration in related sectors, as the ones concerning migration, still lags behind. If looking at the further sub-policy level, the border control sub-policy seems to have experienced higher integration than the associated asylum sub-policy. The differing development of the two migration agencies reflects this disparity: while the EU continues to expand Frontex’s mandate and delegate growing powers to the border agency, EASO is still waiting to be reformed and built into a fully-fledged asylum agency. The deepened integration in the realm of border control and surveillance seems thus to have favoured an increasing supranationalisation through the reinforcement of Frontex and the continuous shift of competences from the national to the agency level. This would confirm a core claim of neofunctionalist scholars stating that integration is deeper and accelerated in those policy areas in which technicians and experts play a central role, because of the *learning* factor that they bring (e.g. Farrell and Héritier 2005, 275; see also Niemann and Speyer 2018). Although this argument appears to be sensible and has found some empirical confirmation, it does not entirely explain the diverging evolution of Frontex and EASO. In fact, ever since initial negotiations on its mandate, official EU documents often referred to the Support Office as an important centre of *expertise*, while Frontex’s primary feature was initially not so much its expertise as its practical support to MS on the ground.

European integration theories are still a significant analytical tool to identify the different speeds of integration in various supranationalised policy areas. Nonetheless, when looking at the EU migration governance the theoretical assumptions of these approaches only partially explain the different delegation processes and consequent integration level within and between the border control and asylum policies. Moreover, by primarily focusing on the functional logic and on the rationality of actors, these theoretical approaches tend to pay more attention to national actors, i.e. the MS, thus overlooking the role of other pivotal players in the decision-making process, such as supranational institutions. The functional logic underlying these theories highlights the role of national authorities and their power relations, but overshadows the relevant supranational passages ‘in-between’ to assess EU integration

and further supranationalisation. Conversely, by deploying a P-A approach the analysis conducted in this dissertation shifted the focus to EU institutions and their role in eventually determining a significant agency empowerment, an institutional change that a neofunctionalist logic alone cannot fully justify. The dissertation thus sought to pinpoint further explanatory factors besides the crisis, such as the specific role of intermediate principals and multiple agents as determinants of institutional change in the EU. In the attempt to explain the Schengen crisis by primarily focusing on MS and their ‘core state powers’, EU integration theories leave out supranational actors concomitantly determining significant agency empowerment in EU migration governance. On the other hand, P-A assumptions allow to gain deeper insights into the role of all the institutional actors involved.

### **6.3 Avenues for Future Research**

In the light of the research conducted in this dissertation, the P-A theoretical approach and the application of a process-tracing method proved useful to unravel the relationships between MS, the European Commission, EU migration agencies, and the EU legislators. However, as shown in the previous sections, the analysis presents also some shortcomings in the deployment of the chosen theoretical approach and the application of the selected methodology. Future research agendas could thus continue to focus on the overall strengthening of the EU’s executive power in sensitive policies as (but not exclusively) the ones regarding border control and asylum, either by further reinforcing the existing P-A model or by deploying other theoretical approaches.

When analysing the significant empowerment of migration agencies or the development of EU agencies in general, P-A assumptions could be strengthened by exploring an aspect that was not investigated in detail in this dissertation, namely the relation between the ‘expertise’ these agencies offer and the principals’ decision to delegate them more powers. Moreover, such an analysis could regard agencies as ‘epistemic communities’ (e.g. Haas 1992; Héritier 2007; Héritier and Lehmkuhl 2008) that wield informational powers, and accordingly ask related questions about their *legitimacy*.

Providing a comparative study on EU agencies across policy areas could be another possible avenue for future research. Scholars could, for instance, compare the ‘empowerment’ of agencies in the migration policy and those agencies that act in a related area, such as the security policy (e.g. Europol and Cefpol). The selection of more case studies can allow to draw further comparisons *across cases* and thus make generalisations, since the researcher would be able to “claim that, as a set of other cases are causally similar to the studied one”, similar

mechanisms can be expected in the further cases (Beach 2017, 2).

The gradually unfolding trend of an ever growing and strengthened EU executive system through the reinforcement of independent institutional bodies such as agencies, calls for additional research on the subject by deploying existing theories (as outlined in the previous sub-sections 6.2.1 and 6.2.2). Especially in the light of the challenging times the EU is living in, analysing the upcoming development of supranational bodies as the EU migration agencies Frontex and EASO and the associated increase in supranational co-operation among EU MS, might allow to gain further insights into policy harmonisation and related integration processes at the EU level.

In this regard, the intergovernmentalist approaches that expect MS to maximise decision-making power and thus limit the challenging authority of supranational institutions, could be combined with the concept of ‘differentiated integration’ (e.g. Stubb 1996; Tekin 2017). The evidence collected in this dissertation showed that on the complex stage of migration policy, MS’ governments are no longer the only actors and definitely not the only ones in control of its development, but they still highly affect decisions at the supranational level, leading to different forms of co-operation and consequent different ‘speeds’ in the integration process.

The two parallel phenomena of *europeanisation* and *agencification* have triggered “autonomy-generating effects” that appear to reinforce EU bodies and counteract a ‘restrictive’ migration *acquis* (Lavenex 2006, 1285). In this regard, P-A theories could be further deployed to specifically analyse the control mechanism aspect and the consequent *accountability* of migration agencies.

Delegation processes have been widely analysed in the trade policy realm (see for instance contributions in Delreux and Adriaensen 2017b), but little has been written until now on delegation with regard to asylum and border control issues. As for most integrated policy areas, the way the EU system functions internally has an impact on how the EU is perceived internationally. Especially in the case of Frontex, the external dimension of the agency’s work, which is represented by its close co-operation with third countries, has relevant implications. Sensitive decisions that have been taken during and after the EU migration crisis are, for instance, often grounded on the risk analyses and reports of the agency. Notions as ‘Fortress Europe’, which was introduced for the first time during World War II, and the construction of walls to protect national borders are not mere fetishes of the past, but have become contemporary again. The two migration agencies might gain again momentum after the two Commission’s proposals of September 2018, which could kick off new reform

processes in both border control and asylum policy. Future research on the EU could eventually be able to answer the question whether and how EU institutions achieved a significant empowerment of the asylum agency after reforming the CEAS and maybe also an even further empowered EBCG. Furthermore, the related external dimension of each agency and the relation with third countries could be an additional topic of analysis.

In these fast-changing times that the world and the EU are witnessing, an ever-increasing Europeanisation of the migration policy seems to be the only feasible alternative and solution. In the view of gathered data, national solutions would be indeed too costly in a world and time that call for 'more EU' rather than less.

The idea of EU migration agencies as mere implementing bodies belongs to the past. The Schengen crisis triggered, as shown in the analyses of Frontex and EASO, major decisional steps towards institutional development in the sub-policies of border control and asylum. Nevertheless, powers have not been evenly delegated to supranational agents acting in the overall migration policy sphere. This study advocates further in-depth research of institutional change in EU migration governance, in order to gain additional insights into a composite institutional landscape by drawing on political science theories and methods and exploring continuous delegation processes within the EU system. More academic research on this topics would be conducive to understand the development of the common EU migration policy and the closely intertwined functioning of the Schengen area. By tracing the significant empowerment of Frontex and EASO after the Schengen crisis, this study outlined the complex constellation of principals and agents in the EU migration policy, arguing that border control and asylum policy should be synchronised and more *supranationalised* if a common approach to migration is to be achieved. Researchers will have to keep observing changes in the migration policy in order to know towards which future the European Union is steering and whether it will be able to prevent future crises.

## Appendix A: Interviews<sup>216</sup>

### Conducted Interviews

Interview with Frontex Expert 1, 18 May 2018

Interview with Frontex Expert 2, 20 June 2018

Interview with Frontex Expert 3, 22 June 2018

Interview with Frontex Expert 4, 25 June 2018

Interview with EASO Expert 1, 11 May 2018

### Script for the interviews

Interviews were conducted with high-level experts working for or in close collaboration with Frontex and/or EASO. At the beginning of each interview, a short introduction to the research project was followed by asking for the informed consent of the interviewee.

#### STAGE 1: INTRODUCTION

Thank you for agreeing to be interviewed. The aim of my research is to identify the causes of significant agency empowerment in EU migration policy. The objective of the research is to obtain an in-depth analysis of the relationship between the agency Frontex/EASO on the one side and EU member states (MS) as well as EU institutions on the other. Moreover, the research puts a focus on the development of this agency after the Schengen crisis<sup>217</sup> with a background analysis of its evolution starting from its establishment (in 2004/2010). The overall purpose is to reach a better understanding of the differing development of EU migration agencies, the recent migration crisis, and – ideally – to offer some predicaments about the agency’s future. Throughout the interview, I will ask open-ended questions, which aim at understanding the triggers, actors and specific steps in decision-making that determined the alleged significant empowerment of Frontex and EASO after the Schengen crisis.

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<sup>216</sup> The interviews were open-ended and semi-structured. Hence, the order of the questions was sometimes changed according to the interviewee’s answers. Follow-up questions were added when necessary.

<sup>217</sup> Specifically, in the case of Frontex through the analysis of the approved Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016], OJ L251/1. In the case of EASO through the analysis of the still to be approved (by the Council and the European Parliament) Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271 final.

STAGE 2: THE INTERVIEW (20/30 minutes approximately, depending on the interviewee's disposition)

1. How long have you been working at Frontex/EASO?
2. How have your tasks and responsibilities evolved over time?

**Topic 1. Significant Empowerment**

3. What was the most important change at Frontex/EASO since the latest refugee crisis?
4. To what extent do you think that the expertise of Frontex/EASO has concretely changed over the last decade?

**Topic 2. Member States (Primary principals)**

5. Why do MS co-operate with Frontex/EASO rather than acting alone?

**Topic 3. Decision-making (Intermediate Principals)**

6. Do/Did you participate on a regular basis in decision-making committees (or informal decision-making meetings)?
7. *(If the answer to question 6 is YES)* What kind of issues are usually discussed during these meetings?

*If the interviewee allows elaborating, researcher will directly ask about the decision-making processes within the Management Board as well as about the dynamics between MS representatives and European Commission representatives during these processes.*

**Topic 4. Series of events leading to Significant Empowerment**

8. When you look back, which national/supranational actors took decisive initiative for a reform/amendment to occur?

*(If interviewee asks to elaborate more: in particular actors such as MS, the European Commission, the EP, NGOs, the agency itself...)*

9. Do you see a trend towards supranationalisation or rather renationalization/intergovernmentalism in the next 5 years?

## Appendix B: Access to Documents and Data

<b>Frontex</b>	<b>Document</b>	<b>Years</b>	<b>Access</b>	<b>Notes</b>
1	General Report	2005-2016	Public Access on Frontex's Website	After the reform of 2016 the name "General Report" has been changed in "Annual Activity Report"
2	Programme of Work	2005-2015	Public Access on Frontex's Website	The last Programme of Work issued in 2015 covers the years 2016-2019
3	Management Board Decisions	2005-2018	Public Access on Frontex's Website	
4	Management Board Minutes	2014-2018	Public Access on Frontex's Website	
<b>EASO</b>	<b>Document</b>	<b>Year</b>	<b>Access</b>	<b>Notes</b>
1	Annual Activity/General Reports <sup>218</sup>	2012-2016	Public Access on Frontex's Website	Annual Report of 2017 to be issued in June 2018 not published yet
2	Work Programmes	2012-2017	Public Access on EASO's Website	The last issued Work Programme covers also a multiannual programming for 2017-2019
3	Management Board Decisions	2011-2017	Access requested, no reply obtained	

<sup>218</sup> Starting from the operational year 2014, the activity report changed its name in general report.



### Requests for interviews about the agency Frontex for dissertation project (non-anonymous)

Request sent on	To	Reply	Notes
7 May 2018	question@frontex.europa.eu	No reply	
7 May 2018	poststelle@bmi.bund.de	Reply	Follow up interview

#### *Message to request interviews about the agency Frontex*

Dear Madame or Sir,

I am a PhD student at the Technical University of Munich (TUM) currently looking for experts working on issues related to the two EU agencies Frontex and EASO, who would kindly agree to spare 30 to 40 minutes of their time to be interviewed for my dissertation.

The current title of my dissertation is „Agency Empowerment: Tracing the Development of Frontex and EASO in the EU migration policy”. It is not possible to enclose an abstract of my project to this form. If you would be interested in learning more, please let me know and I will send you the abstract in my next e-mail.

To that end, I was wondering if you would be so kind as to refer me to relevant departments or divisions, which deal with the agencies' development in terms of tasks, budget, and staff?

Specifically, I am interested in asking the following questions:

- Which national/supranational actors and which decision-making processes were necessary for the reform of Frontex to occur - especially with regard to the EBCG's expansion of tasks, budget, and staff through Regulation (EU) 2016/1624?
- Which national/supranational actors and which steps in the decision-making process were necessary so far with regard to the European Commission's proposal for a new European Union Agency for Asylum?
- Which series of events lead from the outburst of a crisis to an empowerment (in terms of increasing tasks, budget, staff, and expertise) of EU agencies within the common migration policy, e.g. Frontex's reform after the EU refugee crisis (2015-2016)?

Any help that you might be able to provide would be greatly appreciated.

Best Regards,

Vittoria Meissner

### Requests for interviews about the Support Office for dissertation project (non-anonymous)

Request sent on	To	Reply	Notes
9 October 2018	info@easo.europa.eu	No reply	
18 September 2018	research@easo.europa.eu	No reply	
9 July 2018	research@easo.europa.eu	No reply	
30 May 2018	info@easo.europa.eu	No reply	
7 May 2018	poststelle@bmi.bund.de	One general reply	No follow up interview and no further replies after two first exchange of e-mails

#### *Message to request interviews about EASO*

Dear Madam or Sir,

I am a PhD student at the Technical University of Munich (TUM). I am looking for experts working at EASO who would kindly agree to spare a few minutes of their time to be interviewed for my dissertation.

Unfortunately, I have already contacted your agency several times without receiving any reply. I know that you are very busy. Nevertheless any answer you might be able to provide would be greatly appreciated.

The current title of my dissertation is „The Empowerment of European Union Migration Agencies: The European Border and Coast Guard Agency Frontex and the European Asylum Support Office EASO before, during, and after the Schengen crisis”. I have enclosed an abstract of my project to this email if you would be interested in learning more. To that end, I was wondering if you would you be so kind as to refer me to relevant departments or divisions which deal with the agency’s development in terms of tasks, budget, and staff?

Specifically, I am interested in asking the following questions:

- Which national/supranational actors and which steps in the decision-making process were necessary so far with regard to the European Commission’s proposal for a new European Union Agency for Asylum (EUAA)\*?
- Which series of events lead from the outburst of a crisis to an empowerment (in terms of increasing tasks, budget, staff, and expertise) of EU agencies within the common migration policy, e.g. the planned reform of EASO into a new EUAA? Furthermore, would it be possible to access EASO’s Management Board’s decisions? These documents seem not to be available on your website.

Thank you in advance for considering my request. As I mentioned, any help that you might be able to provide would be greatly appreciated.

Best Regards,

Vittoria Meissner

## Request to the European Commission

Request sent on	To	Reply	Notes
28 May 2018	tove.ernst@ec.europa.eu	Two replies	<p>First reply from Ms. Ernst  “Dear Vittoria,  I would advise you to reach out to EASO and the European Border and Coast Guard Agency directly with your request to speak to experts, this is not something the Spokesperson’s Service can assist you with directly.”  My reply:  “Dear Tove,  I have already reached out to EASO and Frontex and they advised me to contact the spokesperson of the European Commission dealing with migration issues.  Since two members of the European Commission sit in each of the agencies’ management boards respectively, I was wondering who exactly has been in charge of representing the Commission within these boards in the last three years and whether they would kindly agree to an interview.  If this request goes completely beyond your scope of activities, any support in identifying the proper contact would be extremely helpful.  Thank you again,  Vittoria”</p> <p>Second reply from Ms. Ernst  “Dear Vittoria,  I would advise you to contact DG HOME directly via the contact form on their website:  <a href="https://ec.europa.eu/home-affairs/who-we-are/contact-us_en">https://ec.europa.eu/home-affairs/who-we-are/contact-us_en</a>  Kind regards,  Tove”</p>
22 May 2018	markus.lammert@ec.europa.eu	No reply	Press contacts, spokesperson’s service of the European Commission
4 June 2018	Form of the Europe Direct Contact Centre	Reply but no additional information obtained	Despite my very specific request, the Europe Direct Contact Centre just sent a general reply containing obvious information (the complete answer by the Europe Direct Contact Centre follows below)
30 November 2018	Request for Annual Activity Reports prior to 2015	Two replies	The Head of Unit “Legal Affairs” of the Directorate A: Strategy and General Affairs Mr. Dimitrios Giotakos only forwarded two annual activity reports of DG HOME of 2005 and 2011 respectively

***Message to the European Commission to request interviews about Frontex and EASO***

[case 101000776486]

Interviews for Dissertation

Dear Madame or Sir,

I am a PhD student at the Technical University of Munich (TUM) currently looking for experts working on issues related to the two EU agencies Frontex and EASO, who would kindly agree to spare 30 to 40 minutes of their time to be interviewed for my dissertation.

The current title of my dissertation is „Agency Empowerment: Tracing the Development of Frontex and EASO in the EU migration policy”. It is not possible to enclose an abstract of my project to this form. If you would be interested in learning more, please let me know and I will send you the abstract in my next e-mail.

To that end, I was wondering if you would be so kind as to refer me to relevant departments or divisions, which deal with the agencies’ development in terms of tasks, budget, and staff?

Specifically, I am interested in asking the following questions:

- Which national/supranational actors and which decision-making processes were necessary for the reform of Frontex to occur - especially with regard to the EBCG’s expansion of tasks, budget, and staff through Regulation (EU) 2016/1624?
- Which national/supranational actors and which steps in the decision-making process were necessary so far with regard to the European Commission’s proposal for a new European Union Agency for Asylum?
- Which series of events lead from the outburst of a crisis to an empowerment (in terms of increasing tasks, budget, staff, and expertise) of EU agencies within the common migration policy, e.g. Frontex’s reform after the EU refugee crisis (2015-2016)?

Any help that you might be able to provide would be greatly appreciated.

Best Regards,

Vittoria Meissner

*Reply by the Europe Direct Contact Centre on 29 June 2018*

Dear Ms Meissner,

Thank you for contacting the Europe Direct Contact Centre.

As the refugee crisis unfolded between 2015 and 2016, the Union's agencies became critical actors in managing the inflow of TCNs into the Union. Hotspots were set up in Greece and Italy where, together with national authorities, EU agency personnel (from the then-Frontex, the European Asylum Support Office and Europol) were deployed to assist in the registration, fingerprinting and security screening of all persons arriving.

Together with this operational deployment, the Commission ensured that the Agencies would be equipped with the means to perform their functions in a new operational reality. This is why in December 2015, the Commission proposed the establishment of the European Border and Coast Guard, consisting of the national authorities of Member States responsible for border management (including coast guards – to the extent that they carry out border management duties) and the European Border and Coast Guard Agency, the latter building on the achievements of Frontex. We are pleased that the co-legislators shared the Commission's view with regard to the urgent need to strengthen Frontex, and that the proposed legislation was adopted in just nine months. In 2016, as part of a package to comprehensively overhaul the Common European Asylum System, the Commission proposed to strengthen the European Asylum Support Office, and turn it into a genuine European Union Agency for Asylum that will be better equipped to support Member States in the harmonised implementation of the Common European Asylum System.

Both of the proposals for strengthened Agencies go through the Union's co-decision process wherein both the European Parliament (EU citizens' representatives) and the Council (Member States' Governments) take positions on the Commission's proposed text and work to reach a political agreement. The European Border and Coast Guard became law in October 2016 and the negotiations on the proposed European Union Asylum Agency have advanced well with the co-legislators.

With this background, it would not be correct to conclude that the empowerment of the Agencies is somehow different. Both will be empowered to address the new political and practical reality of better managing migration in the medium to long term. The only reason for the delay in the empowerment of EASO is that the Agency helps to support Member States in the implementation of the Common European Asylum System. The CEAS rests on seven different pieces of European legislation all of which are now being revised in order to develop it onto a more robust system that is both crisis resistant and future proof.

The EBCG bears a shared responsibility with the MS for the implementation of a European Integrated border management and supports them to manage the external borders in accordance with the relevant provisions of the Union law, notably the Schengen Borders Code and assess vulnerabilities in their management of the external border. It supports also the implementation of the EU return policy thereby contributing to the removal of illegally staying TCNs from the territory of the Member States.

As outlined above, the national/supranational actors and decision-making processes are the same, but indeed the legislative and operational environments are different. Finally, as was demonstrated during the Informal Meeting of EU Leaders on Migration on 24 June, there is no daylight between national leaders when it comes to strengthening the Union's Agencies to better manage migration and border management.

We hope you find this information useful. Please contact us again if you have other questions about the European Union, its activities or institutions.

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